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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-735

SEARS, ROEBUCK AND CO.,

Petitioner,

vs.

SAN DIEGO COUNTY DISTRICT COUNCIL OF CARPENTERS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

Petitioner, Sears, Roebuck and Co., respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of California entered in this case on September 14, 1979, upon remand from this Court in *Sears, Roebuck and Co.* v. *San Diego County District Council of Carpenters,* 436 U. S. 180 (1978).

OPINIONS BELOW

The opinion of the California Supreme Court is attached hereto as Appendix A and is reported at ..... Cal. 3rd ....., ... Cal. Rptr. ....., ... P. 2d ..... (1979). The opinion of this Court remanding this case to the California Supreme Court is reported at 436 U. S. 180 (1978). Prior thereto, the opinions in this case were an unreported opinion of the Califor-

nia Superior Court; an initial decision of the California Court of Appeal reported at 49 Cal. App. 3d 232, 122 Cal. Rptr. 449 (1975); an unreported order of the California Supreme Court retransferring the case back to the Court of Appeal; a subsequent opinion by the California Court of Appeal reported at 52 Cal. App. 3d 690, 125 Cal. Rptr. 245 (1975); and the first opinion of the California Supreme Court reported at 17 Cal. 3d 893, 132 Cal. Rptr. 443, 553 P. 2d 603 (1976).

JURISDICTION

The opinion and judgment of the Supreme Court of California issued on September 14, 1979. App. A and App. B. This judgment is final for purposes of review by this Court. *Market St. Railway Co.* v. *Railroad Comm.*, 324 U. S. 548, 551-52 (1944). The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(3).

QUESTIONS PRESENTED

1. Is a state law, expressly designed to regulate labor-management relations, which makes lawful and unenjoinable unprotected union activity on private property, preempted by national labor policy?

2. Is a state law, which confiscates private property for a multitude of union activities, violative of that property owner's rights under the Fifth and Fourteenth Amendments?

3. Is the decision below in accord with this Court's remand of the instant case "for further proceedings not inconsistent" with its opinion (436 U. S. at 208)?

4. Is a state law, which withholds any remedy and precludes any employer self-help against unprotected union activity on private property, a denial of procedural due process?

STATUTORY AND CONSTITUTIONAL PROVISIONS

The relevant provisions of the Moscone Act, Cal. Code of Civ. Procedure § 527.3, and the California Penal Code, Cal. Code Ann. § 602, are set forth in Appendix C. Other relevant provisions are the Supremacy Clause (Article VI, Clause 2) and the Fifth and Fourteenth Amendments to the United States Constitution which are also set forth in Appendix C.

STATEMENT OF THE CASE

The facts which gave rise to this controversy are set forth in this Court's prior decision. 436 U. S. at 182-183. Upon remand for further proceedings not inconsistent with that opinion, the California Supreme Court again concluded, in an opinion by Justices Tobriner and Mosk and Chief Justice Bird, that the California courts lacked jurisdiction to enjoin the union picketing here at issue. App. A, pp. A1-A17. Justice Newman wrote a concurring opinion (App. A, p. A17), Justices Clark and Manuel a dissenting opinion (App. A, pp. A18-21), and Justice Richardson also issued a dissenting opinion (App. A, pp. A22-24).

The Court's majority opinion concluded that, as a result of the Moscone Act, Cal. Code of Civ. Proc. § 527.3, which was enacted while this case was on its initial appeal to the California Supreme Court, the picketing here at issue "constitute[d] an exception to the [California] criminal trespass statutes." App. A., p. A13, n. 9. The state courts were foreclosed, therefore, from enjoining that picketing and were required to find such conduct to be a "lawful activity." App. A, p. A4. This conclusion was premised on the view that "the decisions of the United States Supreme Court and of this court recognized that the State of California, by statute or by judicial decision may permit union activity on private premises." App. A, p. A11. Moreover, the majority concluded that since no

federal statute "confers on the employer an affirmative right to exclude union pickets . . . Sears can assert no claim based on the federal Constitution, statutes or cases which would require the California courts to enjoin the picketing in the present case." App. A., p. 16.

Other contentions raised by Sears were also rejected. The Court concluded that it was not required to follow the federal *N. L. R. B.* v. *Babcock & Wilcox,* 351 U. S. 105 (1956), criteria for permitting access on private property which "turns largely on the matter of availability of adequate alternative channels of communication," but was free to establish a rule "of more general applicability" which permits peaceful access in *every* case. App. A, pp. A12-A13. The Court additionally rejected the argument that, under the decisions of this Court in *Lloyd Corp.* v. *Tanner,* 407 U. S. 551 (1972), *Central Hardware Co.* v. *N. L. R. B.,* 407 U. S. 539 (1972), and *Scott Hudgens* v. *N. L. R. B.,* 424 U. S. 507 (1976), Sears had a federal Constitutional right to prohibit the picketing. It held that those decisions of this Court "did not involve a constitutionally protected right of property at all" and that since the purpose of the Moscone Act—"the elimination of unnecessary judicial intervention into labor disputes—indisputably bears a reasonable relationship to legitimate state objectives," that statute passes muster under the Fifth and Fourteenth Amendments. App. A, pp. A15-A16. Accordingly, the Court reversed the order granting a preliminary injunction.

REASONS FOR GRANTING THE WRIT

1. In its prior decision in this case, this Court addressed the *San Diego Bldg. Trades Council* v. *Garmon,* 359 U. S. 236 (1959), question of whether the Union's area standards picketing of Sears constituted conduct which was either arguably protected or arguably prohibited by the National Labor Relations Act, 29 U. S. C. § 151, *et seq.* If so, then the states were foreclosed from acting by the exclusive jurisdiction of the

National Labor Relations Board. This Court concluded, however, that the picketing was not encompassed by either branch of the *Garmon* doctrine: that (1) since the state court action challenged only the location of the picketing, rather than its objective, there was "no realistic risk of interference with the Labor Board's primary jurisdiction to enforce the statutory prohibition against unfair labor practices" (436 U. S. at 198) and (2) since the Union's picketing "would be unprotected in most instances" by federal law, "the assertion of state jurisdiction . . . does not create a significant risk of prohibition of protected conduct" (436 U. S. at 206-207). Indeed, the Union subsequently conceded before the California Supreme Court that its conduct was not protected by federal law. App. A, p. A3.

As a result, the case was remanded for the California Supreme Court to determine whether the injunction had been properly issued. In making that determination, however, the court was still required to consider the other "line of pre-emption analysis . . . unaffected" by this Court's prior decision: that there is "conduct which a State may not prohibit even though it is not covered by § 7 of the [Labor] Act." *Sears,* 436 U. S. at 199, n. 30; *See also Lodge 76 IAM* v. *Wisconsin Employment Rel. Comm.,* 427 U. S. 132, 138, 140-151 (1977). Congress has intended, as this Court recently made clear, that in certain situations notwithstanding that the conduct involved is neither protected nor prohibited by the Labor Act, "the exercise of state authority" would, nevertheless, "frustrate effective implementation of the policies" of that Act. *New York Telephone Co.* v. *New York State Dept. of Labor,* ..... U. S. ....., 99 S. Ct. 1328, 1336 (1979). This aspect of preemption has its "greatest force" where, as here, the state law involved is not a neutral "law of general applicability" but, instead, a law "regulating the relations between employees, their union and their employer." *Sears,* 436 U. S. at 193; *see also New York Telephone,* 99 S. Ct. at 1337-8, 1340-1.

The California Supreme Court's decision in this case was squarely premised on the Moscone Act, a state statute which, as stated by the court below, expressly "established the legality of certain labor practices and limits the equity jurisdiction of the superior courts to enjoin such practices." App. A, p. A4. The provisions of subdivision (b), the section deemed controlling here, apply only to "labor disputes"; picketing or communication for any other purpose is unaffected. *Id.* at A5-A6. Moreover, the California Supreme Court's analysis of subdivision (b) specifically weighed the "special interests of employers, union, or the public . . . in labor disputes (*Lodge 76, Machinists,* 427 U. S. at 156 (Powell, J., and Burger, C. J., concurring); see also Cox, *Labor Law Preemption Revisited,* 85 Harv. L. Rev. 1337, 1352, 1355-1356 (1972)). The Court, in balancing "the union's interest" against that of the property owner (App. A, pp. A7-A8, A11), held that it was not bound by the federal criteria, and relied solely upon California decisions which had granted "labor unions the right to conduct certain activities on private property" (*Id.* at A10). It then concluded that "subdivision (b) [of the Moscone Act], so construed, bars the injunction issued in the instant case." *Id.* at A12. The Court's opinion even foreclosed the exercise of self-help by an employer to eject pickets on the ground that since the picketing was "lawful", the employer "has no (such) right." *Id.* at A14-A15, n. 11.

The present case thus presents a significant question with respect to the permissible extent of a state's legislative power, directly aimed at labor objectives, to infringe upon federal labor policy. In contrast to *New York Telephone,* California here has directly sought to impose its own substantive regulation of labor-management relations. As in *Teamsters Union* v. *Morton,* 377 U. S. 252, 260 (1964), the "inevitable result [will] be to frustrate the congressional determination to leave this weapon of self-help available, and to upset the balance of power between labor and management expressed in our national labor policy." This Court's prior decision permitted the

state courts to apply laws reflecting neutral public policies to determine the legality of the Union's entry on Sears' property. Such entry was to be considered no differently than any other trespass. The California Supreme Court, however, has instead "invoked a special remedy under a state labor law." *Sears,* 436 U. S. at 193, n. 22. It has held that "union activity which is authorized by state labor law constitutes an exception to the criminal trespass statutes." App. A, p. A13, n. 9. No reliance has been placed on any provision of generally applicable California law. *Id.* at A9-A10, n. 5. The question of whether this deliberate state regulation of bargaining relationships is a permissible intrusion upon the national labor policy is one which warrants resolution by this Court.[1]

2. In *PruneYard Shopping Center* v. *Robins,* No. 79-289, on appeal from the California Supreme Court, this Court has been asked to resolve the question of whether a State may require, notwithstanding the Fifth and Fourteenth Amendments, the "exercise [of] general rights of free speech on property privately owned and used nondiscriminatorily for private purposes only." (*Lloyd Corp.,* 407 U. S. at 568). The same confiscation of private property in derogation of paramount federal Constitutional rights has occurred in this case. As dissenting Justice Richardson observed below, in this case, as in *PruneYard,*

1. This issue is not, of course, confined to the factual setting of this case. Subsection (b) of the Moscone Act applies to a wide variety of union activities, *viz.,* "giving publicity to, and obtaining or communicating information regarding the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling . . . or by any other method not involving fraud, violence or breach of the peace[;] peaceful picketing or patrolling involving any labor dispute, whether engaged in singly or in numbers[; or] assembling peaceably to do any of [these] acts . . . or to promote lawful interests." App. C, pp. A26-A28. All such activity is deemed lawful and unenjoinable "[i]rrespective of how controversial, offensive, distracting or extensive such conduct may be" (*Lloyd,* 407 U. S. at 564, n. 11) or that the accommodation between bargaining rights and property rights "may fall at different points along the spectrum depending on the nature and strength of the respective rights . . . asserted in any given context" (*Hudgens* v. *N. L. R. B.,* 424 U. S. 507, 526 (1976)).

"[w]here there are available other reasonable means of transmitting the union message, such trespassory activity must yield to the 'paramount federal constitutional imperative' protecting the property interests of the landowner." App. A, p. A24 (dissenting op.). A grant of the present petition would thus provide the Court with a desirable opportunity to resolve, in a different although equally compelling context, "arguments . . . [which] are necessarily identical." *Roe* v. *Wade*, 410 U. S. 113, 123 (1973).

3. In its prior decision in this case, this Court emphasized "the anomalous consequence of a rule which would deny the employer access to any forum in which to litigate either the trespass issue or the protection issue in those cases in which the disputed conduct is least likely to be protected by § 7 [of the Labor Act]." 436 U. S. at 206-207. That anomaly still exists. There is still no forum, federal or state, in which to litigate the merits of either issue. "The balance is struck", in the language of Justice Richardson's dissent below, "in advance and uniformly, in favor of trespassory labor activity whether or not reasonable alternative means of communication exist, and whether or not these activities involve only a 'temporary and minimal' yielding of the store owner's property rights." App. A, p. 24 (dissenting op.).

Under federal law, the burden imposed on a union to justify access on private property is a "heavy one" with the balance only "rarely being in favor of trespassory activity." *Sears*, 436 U. S. at 205. Such activity is "unprotected in most instances," particularly in the case of area standards picketing. *Ibid.* and n. 42. To obtain protection, the union must show "no other reasonable means of communicating its organizational message to the employees exists or that the employer's access rules discriminate against union solicitation." *Id.* at 205. Under the decision below, however, unions in California now have no such obligation. Protection has been automatically afforded by state law in *all* cases without any adjudication of the competing interests involved. This is clearly contrary to the law in other

jurisdictions. See, e.g., *People* v. *Bush*, 384 N. Y. 2d 733, 349 N. E. 2d 832 (1976); *May Dept. Stores* v. *Teamsters Local 743*, 64 Ill. 2d 153, 355 N. E. 2d 7 (1976). It also calls into question the validity under state law of federally permissible no-solicitation rules against non-employee activity on private property. See, e.g., *Babcock & Wilcox*, 351 U. S. at 112-113. And it surely turns this Court's prior *Sears* decision on its head; as the dissent in that case observed, the basic considerations underlying the Court's majority opinion were twofold: that the type of activity here involved was "more likely to be unprotected than protected," and that where an "argument in favor of protection is the strongest, the union is likely to invoke the Board's jurisdiction and thereby avoid the state forum." 436 U. S. at 230-232 (dissenting op.). Now, however, the unprotected nature of the Union's picketing has been rendered immaterial for the State has declared all such activity to be "legal." Similarly, the Union has been able to avoid a state forum without any obligation to invoke Board jurisdiction or even justify its conduct under the *Babcock & Wilcox* standard. This serious dislocation of national labor policy requires corrective action by this Court.

4. California's refusal to allow any relief against unprotected union activity also raises serious procedural due process questions. The decision below not only prevents Sears from seeking "the protection of the State's trespass laws", it additionally precludes the Company from "forcefully evict[ing] the pickets." The only option remaining is to "permit the pickets to remain on its property." *Sears*, 436 U. S. at 202. Sears has thereby been left without any means to terminate the Union's unprotected activity. The employer has thus been deprived of "a significant property interest" (cf. *Fuentes* v. *Shevin*, 407 U. S. 67, 87 (1972)), the "right" as a "general rule" to "bar nonemployee union organizers from his property." *Sears*, 436 U. S. at 205. As this Court has repeatedly recognized, ". . . a statute or rule may be held constitutionally invalid as applied when it operates

to deprive an individual of a protected right . . ." *Boddie* v. *Connecticut,* 401 U. S. 371, 379 (1951). Where, as here, a State leaves serious losses inflicted by improper conduct "remediless . . . [the result is] to disregard fundamental rights of liberty and property and to deprive the person suffering the loss of due process of law." *Truax* v. *Corrigan,* 257 U. S. 312, 330 (1921).

CONCLUSION

For all of the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SEARS, ROEBUCK & COMPANY, *Plaintiff and Respondent,* *vs.* SAN DIEGO COUNTY DISTRICT COUNCIL OF CARPENTERS, *Defendant and Appellant.*	L. A. 30562 Super. Ct. No. 347511

Defendant San Diego County District Council of Carpenters (union) appeals from an order granting a preliminary injunction restraining the union, its officers, agents, representatives and members, from picketing on the property of plaintiff Sears, Roebuck & Co. (Sears). In an earlier opinion (Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters (1976) 17 Cal. 3d 893), we held that the jurisdiction of the superior court to issue the injunction was preempted by the National Labor Relations Act (29 U. S. C. § 151 et seq.). The United States Supreme Court granted certiorari, reversed our decision on the issue of preemption, and remanded the cause to this court for resolution of the remaining legal issues. (Sears, Roebuck & Company v. San Diego County Dist. Council of Carperters (1978) 436 U. S. 180.)

While this case was pending on appeal, the Legislature enacted the Moscone Act, Code of Civil Procedure section 527.3, which limits the equity jurisdiction of superior courts in granting injunctions in cases involving labor disputes. The injunction issued by the superior court here banned picketing on the privately owned sidewalks surrounding the Sears Chula Vista store even though the picketing was peaceful and did not inter-

fere with access to the store. As we shall explain, the Moscone Act, interpreted in light of prior decisions of this court, declares such peaceful picketing to be legal and thus not subject to injunction. Rejecting Sears' contention that it enjoys a federally protected right to enjoin peaceful picketing on property it has opened to public use, we conclude that the trial court lacks jurisdiction to enjoin the picketing at issue here.

We described the factual setting of this case in our previous opinion at 17 Cal. 3d 893, 895-896; we summarize that description briefly here. The Sears Chula Vista store sits in the center of a large parking area. To protect Sears' refusal to agree either to have carpentry work performed by workers dispatched by the union or to adhere to the union's master agreement for use of carpenters, the union posted pickets on the privately owned sidewalks immediately surrounding the Sears store. "It is not disputed that at all times while they were on Sears' property the pickets conducted themselves in a peaceful and orderly fashion. The record discloses no acts of violence, threats of violence, or obstruction of traffic." (17 Cal. 3d at p. 896.)

When the union rejected Sears' request that the pickets be removed from Sears' property, the store sued and obtained a temporary restraining order. The union protested the order on the ground that although the injunction permitted picketing on the public sidewalks, 220 to 490 feet away from the store, such picketing was too distant for customers to read the pickets' signs. Nevertheless the superior court, on November 21, 1973, issued a preliminary injunction restraining the union, its officers, agents, representatives and members, from "carrying on picketing on the plaintiff's property."

On appeal, we reversed the order of the superior court. Finding that the picketing was both arguably protected activity under section 7 of the National Labor Relations Act, and arguably prohibited activity under section 8 of that act, we held that under San Diego Union v. Garmon (1959) 359 U. S. 236 the

National Labor Relations Board had primary jurisdiction over the controversy.

The United States Supreme Court granted certiorari. Limiting the *Garmon* doctrine, the high court indicated that the fact that conduct is arguably protected or prohibited by the National Labor Relations Act may not be sufficient to establish the primary jurisdiction of the NLRB unless the party harmed by that conduct enjoys a suitable means of presenting the issue to the board. (Sears, Roebuck & Co. v. San Diego County District Council of Carpenters, *supra,* 436 U. S. 180, 198, 207.) Because the only issue Sears could frame before the board turns on whether the union engaged in improper recognitional picketing, a narrow issue not decisive of Sears' right to enjoin the picketing as a trespass, the court concluded that we had erred in holding the NLRB had primary jurisdiction over the controversy.

The Supreme Court remanded the cause to us for further consideration. Its opinion identified one issue for resolution here; in footnote 8, the Supreme Court's opinion observes that: "The State Superior Court and Court of Appeal concluded that the Union's activity violated state law. Because it concluded that the state courts lacked jurisdiction to entertain the state trespass claim, the California Supreme Court did not address the merits of the lower court rulings. The Union contends that those rulings were incorrect. Though we regard the state-law issue as foreclosed in this Court, there is of course nothing in our decision on the pre-emption issue which bars consideration of the Union's arguments by the California Supreme Court on remand." (436 U. S. at p. 185.)[1]

1. The Supreme Court decision also left unresolved the issue whether the union's activity was not merely arguably protected by federal law, as we held in the first *Sears* opinion, but in fact protected by that law. If in fact the union's activity was protected, then clearly state courts cannot enjoin it. The union, however, in its supplemental brief, expressly disclaims any intention to contend here that its picketing was protected conduct under federal labor law.

By supplemental brief, the union calls to our attention a second issue. The Moscone Act (Code Civ. Proc., § 527.3), enacted in 1975, establishes the legality of certain labor practices and limits the equity jurisdiction of the superior court to enjoin such practices. Although the Legislature passed this act subsequent to the grant of the preliminary injunction in the case at bar, the parties recognize that "relief by injunction operates in future, and the right to it must be determined as of the date of decision by an appellate court." (American Fruit Growers v. Parker (1943) 22 Cal. 2d 513, 515; see Kash Enterprises, Inc. v. City of Los Angeles (1977) 19 Cal. 3d 294, 306 and cases there cited.) Accordingly, if the superior court lacks jurisdiction to enjoin the union's conduct under current section 527.3, the injunction previously issued must be reversed.

In the instant case the two issues before us—the lawfulness of the picketing under prior California law and the power of the superior court to enjoin it under section 527.3—coalesce into one. Although the reach of the Moscone Act may in some respects be unclear, its language leaves no doubt but that the Legislature intended to insulate from the court's injunctive power all union activity which, under prior California decisions, has been declared to be *"lawful activity."* Since, as we shall explain, we find that the picketing at issue here is clearly "lawful" under prior California law, it follows that under the Moscone Act the superior court lacks the power to enjoin that picketing.

The Moscone Act was a compromise measure. The original bill, drafted by union attorneys, clearly sought to limit the injunctive jurisdiction of the superior court. The act declared its purpose expressly: to prevent "the evils which frequently occur when courts interfere with the normal process of dispute resolution between employers and recognized employee organizations." (Code Civ. Proc., § 527.3, subd. (a).)[2] The Legislature

2. The preamble to the Moscone Act identifies the procedural inequities which occur when the courts issue injunctions in labor disputes. It states:

(Footnote continued on next page.)

amended the bill to add provisions proposed by management supporters without, however, deleting any of the original provisions. In section 527.3 as finally enacted, the provisions added by amendment strike a discordant stance from those surviving from the original draft, thus creating difficult problems of statutory interpretation.

The issue in the present case involves primarily the interpretation of subdivision (b), one of the provisions remaining from the original draft. This subdivision provides as follows:

"The acts enumerated in this subdivision, whether performed singly or in concert, shall be legal, and no court nor any judge nor judges thereof, shall have jurisdiction to issue any restraining order or preliminary or permanent injunction which, in

(Footnote continued from preceding page.)

"In the interpretation and application of this act the public policy of this state is declared as follows:

"Under prevailing economic conditions the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor and thereby to obtain acceptable terms and conditions of employment. It is therefore necessary that he have full freedom of association and self-organization and the right to engage in concerted activities for the purpose of collective bargaining, picketing or other mutual aid or protection.

"Equity procedure that permits a complaining party to obtain sweeping injunctive relief that is not preceded by or conditioned upon notice to and hearing of the responding party or parties, or that issues after hearing based upon written affidavits alone and not wholly or in part upon examination, confrontation and cross-examination of witnesses in open court, is peculiarly subject to abuse in labor litigation for each of the following reasons:

"(a) The status quo cannot be maintained, but is necessarily altered by the injunction.

"(b) The determination of issues of veracity and of probability of fact from the affidavits of the opposing parties which are contradictory and, under the circumstances, untrustworthy rather than from oral examination in open court, is subject to grave error.

"(c) The error in issuing the injunctive relief is usually irreparable to the opposing party.

"(d) The delay incident to the normal course of appellate procedure frequently makes ultimate correction of error in law or in fact unavailing in the particular case." Stats. 1975, ch. 1156, p. 2845, § 1.)

specific or general terms, prohibits any person or persons, whether singly or in concert, from doing any of the following:

"(1) Giving publicity to, and obtaining or communicating information regarding the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking patrolling any public street or any place where any person or persons may lawfully be, or by any other method not involving fraud, violence or breach of the peace.

"(2) Peaceful picketing or patrolling involving any labor dispute, whether engaged in singly or in numbers.

"(3) Assembling peaceably to do any of the acts specified in paragraphs (1) and (2) or to promote lawful interests."

The language of this subdivision, although broad and sweeping in scope and purpose, leaves some doubt respecting its application to the present context. Subpart (2) of the subdivision appears to declare "peaceful picketing" to be legal, and thus not subject to injunction, without regard to the location of the picketing; subpart (1), however, declares picketing "not involving fraud, violence or breach of the peace" legal only if it occurs in "any public street or any place where any person or persons may lawfully be." The act does not define this latter phrase. It is suggested that the statutory language cannot be taken literally; a strict reading might appear to authorize picketing in the aisles of the Sears store or even in the private offices of its executives. Arguably, at some such point even peaceful picketing might represent so intrusive an invasion of Sears' use of its property as to compel judicial intervention.

We need not define the precise meaning of subdivision (b) to resolve this present case. Although, as we have seen, the language of subdivision (b) standing alone does not define whether the acts prohibits an injunction against picketing in the context of this case, the concluding clause of subdivision (a) offers a guide to the construction of subdivision (b) and

clarifies this issue.[3] That clause provides that "the provisions of subdivision (b) . . . shall be strictly construed in accordance with existing law governing labor disputes with the purpose of avoiding any unnecessary judicial interference in labor disputes."[4] As we shall demonstrate, "existing law," as set out in prior decisions of this court, establishes that peaceful picketing on privately owned walks outside the employer's store is not subject to injunction; those decisions also explain that judicial intervention in such a case is "unnecessary" to protect substantial rights of the employer.

In Schwartz-Torrance Investment Corp. v. Bakery & Confectionery Workers' Union (1964), 61 Cal. 2d 766 (Schwartz-Torrance), the superior court enjoined a union from stationing pickets outside the entrance of a bakery on property owned by plaintiff shopping center. On appeal, we stated that the validity of the injunction turned upon a balancing of the union's interest in peaceful picketing for a lawful purpose against the plaintiff's interest in the use and possession of its property.

The union's interest we first noted, rests upon both state policy favoring concerted activities of employees (61 Cal. 2d at p. 769; see Lab. Code, § 923; Messner v. Journeymen Barbers etc. International Union (1960), 53 Cal. 2d 873, 882) and upon principles protecting free speech (61 Cal. 2d at p. 770; see Hughes v. Superior Court (1948), 32 Cal. 2d 850, 854).

3. Subdivision (a) of section 527.3 reads as follows: "In order to promote the rights of workers to engage in concerted activities for the purpose of collective bargaining, picketing or other mutual aid or protection, and to prevent the evils which frequently occur when courts interfere with the normal processes of dispute resolution between employers and recognized employee organizations, the equity jurisdiction of the courts in cases involving or growing out of a labor dispute shall be no broader than as set forth in subdivision (b) of this section, and the provisions of subdivision (b) of this section shall be strictly construed in accordance with existing law governing labor disputes with the purpose of avoiding any unnecessary judicial interference in labor disputes."

4. The phrase "in accordance with existing law governing labor disputes" in subdivision (a) was contained in the language added by amendment to the original draft of the Moscone Act.

Although plaintiff asserted a countervailing interest in the exclusive possession and enjoyment of its property, we noted that "Because of the public character of the shopping center, . . . the impairment of plaintiff's interest must be largely theoretical. . . . Plaintiff suffers no significant harm in the deprivation of absolute power to prohibit peaceful picketing upon property to which it has invited the entire public." (61 Cal. 2d at p. 771.) We therefore found that the interest of the union in peaceful picketing outweighed the property right of the center, and reversed the injunction.

We concluded our opinion in the following language: "[T]he picketing in the present case cannot be adjudged in the terms of absolute property rights; it must be considered as part of the law of labor relations, and a balance cast between the opposing interests of the union and the lessor of the shopping center. The prohibition of the picketing would in substance deprive the union of the opportunity to conduct its picketing at the most effective point of persuasion: the place of the involved business. The interest of the union thus rests upon the solid substance of public policy and constitutional right; the interest of the plaintiff lies in the shadow cast by a property right worn thin by public usage." (61 Cal. 2d at pp. 774-775.)

In re Lane (1969) 71 Cal. 2d 872 (Lane), involved a grocery store situated within a privately owned parking area—a factual setting comparable to the present case. Petitioner Lane distributed hand bills on the private sidewalk outside the entrance to the store. He was arrested and convicted of violating city ordinances that prohibited remaining on another's property after being notified by the owner to leave and of distributing handbills on private property without the owner's consent. Relying both on federal free speech guarantees as set out in the *Logan Valley* case (Amalgamated Food Emp. Union Local 590 v. Logan Valley Plaza (1968), 391 U. S. 308) and state labor policy as established in *Schwartz-Torrance,* we ordered petitioner's release. In language fully applicable to the

instant case, we explained that "If we were to hold the particular sidewalk area to be 'off limits' for the exercise of First Amendment rights in effect we would be saying that by erecting a *'cordon sanitaire'* around its store, [the store] has succeeded in immunizing itself from on-the-spot public criticism." (71 Cal. 2d 872, 876.) In 1970 this court, in its first opinion in Diamond v. Bland (1970), 3 Cal. 3d 653 (Diamond I) applied First Amendment principles as expounded in *Logan Valley* to hold that persons may circulate initiative petitions on shopping center property even though the challenged activity did not involve a labor dispute.

Thus until 1972, decisions of this court and the United States Supreme Court had moved steadily toward the protection of the exercise of free speech upon private business property open to the public. In that year, however, the Supreme Court changed its views on the scope of the First Amendment's embrace of speech on private premises open to the public. In Lloyd Corp. v. Tanner (1972), 407 U. S. 551, the Supreme Court rejected the reasoning of *Logan Valley,* decreeing that leafleting on shopping center property, which did not relate to any purpose contemplated by the center, found no First Amendment protection. A companion case, Central Hardware Co. v. NLRB (1972) 407 U. S. 539, held that a union enjoyed no constitutional right to conduct organizational picketing in the employer's parking lot. Finally in Hudgens v. NLRB (1975), 424 U. S. 507 the Supreme Court expressly overruled *Logan Valley* and held that the First Amendment does not protect picketing on shopping center property.[5]

5. Following the Supreme Court decisions in *Lloyd* and *Central Hardware,* the trial court in *Diamond* v. *Bland* vacated the injunction restraining the shopping center from interfering with the circulation of initiative petitions. On appeal, a majority of this court affirmed the trial court action, holding that under the federal decisions the First Amendment did not protect petitioners' activities on the shopping center property. (Diamond v. Bland (1974) 11 Cal. 3d 331 (Diamond II).) Our decision also rejected petitioners' con-

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Regardless of any claim of constitutional right, however, both the United States Supreme Court and this court have consistently recognized that federal or state labor law may grant unions rights to conduct activities on the employer's property. In both Hudgens v. NLRB, supra, 424 U. S. 507 and Central Hardware Co. v. NLRB, supra, 407 U. S. 539, the high court's holding that the First Amendment did not protect the union's picketing was not dispositive of the case; instead the court remanded the case to the NLRB to determine whether the union had a right to picket under NLRB v. Babcock & Wilcox Co. (1956) 351 U. S. 105, a decision interpreting federal labor law. In *Hudgens* the court observed expressly that "statutory or common law may in some situations extend protection . . . against a private corporation . . . who seeks to abridge the free expression of others. . . ." (424 U. S. at p. 513.)

The decisions of this court also recognize that statutes and judicial decisions may grant labor unions the right to conduct certain activities on private property. In *Diamond II*, when this court relied on the federal cases to reject the claim of constitutional right by persons circulating initiative petitions, our decision did not overrule either *Schwartz-Torrance* or *Lane;* we distinguished both cases on the ground that "labor unions had a labor dispute with, and were picketing businesses located within the shopping centers . . . a factor which led us to strike the balance between private property rights and First Amendment activities in favor of the latter." (11 Cal. 3d at p. 334, fn. 3.) Subsequently in Agricultural Labor Relations Bd. v. Superior Court (1976), 16 Cal. 3d 392, we held that state statutory and administrative law could authorize union access and organizing on a private employer's property.[6]

In summary, the decisions of the United States Supreme Court and of this Court recognize that the State of California, by statute or by judicial decision, may permit union activity on private premises. Our earlier decisions in *Schwartz-Torrance* and *Lane*—rulings which have not been overruled or eroded in later cases—established the legality of union picketing on private sidewalks outside a store as a matter of state labor law. Those decisions explained further that judicial action to bar such picketing was unnecessary; because the interest of the landowner was but a "thin" and "technical interest" (*Schwartz-Torrance,* 61 Cal. 2d at pp. 771, 775), an injunction against such picketing could not be deemed essential to prevent a substantial impairment of property rights.

As we noted earlier, subdivision (a) of the Moscone Act requires the anti-injunction provisions of subdivision (b) to "be strictly construed in accordance wih existing law governing labor disputes with the purpose of avoiding any unnecessary judicial interference in labor disputes." We believe that this langauge requires us to construe subdivision (b) in accord with the holding on *Schwartz-Torrance* and *Lane* of the legality of peaceful picketing on private walkways outside a store, and of the lack of necessity of judicial interference to protect any

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tention that the state Constitution authorized them to circulate petitions at the shopping center; construing *Lloyd* and *Central Hardware* as holding that the center enjoyed a federal constitutional right of property to exclude petitioners, we concluded that such federal right would prevail over any state constitutional right. (See 11 Cal. 3d at p. 335, fn. 4.)

Recently we reconsidered the question of the rights of the property owner, and concluded that *Lloyd* and *Central Hardware* did not confer on the shopping center a federal constitutional right to eject persons who are circulating petitions. Overruling *Diamond II,* we held that article I, sections 2 and 3 of the California Constitution protects the circulation of petitions on shopping center property. (Robins v. Pruneyard Shopping Center (1979) ..... Cal. 3d ....., ...)

The *Robins* decision rests on provisions of the California Constitution. In the instant case, our decision rests on the terms of Code of Civil Procedure section 527.3; accordingly we express no opinion on whether the California Constitution protects the picketing here at issue.

6. The United States Supreme Court dismissed an appeal in this case for want of a substantial federal question. (97 Sup. Ct. pp. 33-34.) The court regards such action as a decision on the merits. (Hicks v. Miranda (1975) 422 U. S. 332.)

substantial right of the landowner. We conclude that subdivision (b), so construed, bars the injunction issued in the instant case.

Sears argues, however, that subdivision (a)'s reference to "existing law governing labor disputes" refers not only to *Schwartz- Torrance* and *Lane,* but also to the United States Supreme Court decisions in Hudgens v. NLRB, supra, 424 U. S. 507, Central Hardware Co. v. NLRB supra, 407 U. S. 539, and Lloyd Corp. v. Tanner, supra, 407 U. S. 551. As we explained in Robins v. Pruneyard Shopping Center, supra, ... Cal. 3d ....., those Supreme Court decisions hold merely that the action of the landowner in ejecting persons from his property did not constitute state action under the Fourteenth Amendment—an issue irrelevant to the present case. The cited decisions do not establish rules of law "governing labor disputes."

Since both *Hudgens* and *Central Hardware* remanded actions to the NLRB for reconsideration under NLRB v. Babcock & Wilcox Co., supra, 351 U. S. 105, we might view Sears' argument as a contention that subdivision (a) incorporates into California law the *Babcock & Wilcox* doctrine under which a union's right to conduct activities on the employer's premises turns largely on the matter of the availability of adequate alternative channels of communication. That doctrine, however, rests on language of the National Labor Relations Act (29 U. S. C. § 151 et seq.) defining certain employer actions as unfair labor practices;[7] and as we have seen, California courts have never followed the *Babcock & Wilcox* doctrine requiring a case-by-case determination, but have established rules of more general applicability. (See *Schwartz-Torrance;* cf. Agricultural Labor Relations Bd. v. Superior Court, supra, 16 Cal. 3d 392, 409.)

7. The *Babcock & Wilcox* doctrine is not a rule of constitutional law binding upon the states. (Agricultural Labor Relations Bd. v. Superior Court, supra, 16 Cal. 3d 392, 409.)

In commanding the courts to construe subdivision (b) of section 527.3 in accord with "existing law governing labor disputes," the Legislature we believe, intended the courts to continue to follow principles of California labor law extant at the time of the enactment of section 527.3.[8] We do not surmise that the Legislature intended the courts to abandon such principles in favor of federal rules, such as the *Babcock & Wilcox* doctrine, which rest upon a statutory and administrative basis not found in California law.

Sears further contends that injunctive relief against the union's alleged trespass is authorized by subdivision (e), one of the provisions added by amendment to the Moscone Act. Subdivision (e) provides that "It is not the intent of this section [section 527.3] to permit conduct that is unlawful including breach of the peace, disorderly conduct, the unlawful blocking of access or egress to premises where a labor dispute exists, or other similar unlawful activity." We find this subdivision inapposite, for two reasons. First, the picketing in the instant case, by reason of the decisions of this court in *Schwartz-Torrance* and *Lane* and the express language of subdivision (b) of the act, is lawful conduct so long as it does not involve fraud, violence, or breach of the peace.[9] Second, under the

8. In requiring that subdivision (b) be construed in accord with existing law governing labor disputes, subdivision (a) states that such construction should serve "the purpose of avoiding any unnecessary judicial interference in labor disputes." Consequently if, as the preamble to section 527.3 suggests, existing law permits certain unnecessary judicial interference, the language of subdivision (a) does not preclude the courts from construing subdivision (b) to avoid such interference in the future.

9. The parties dispute whether the picketing in the instant case constituted a criminal trespass under subdivisions (j), (k), or (*l*) of Penal Code section 602. We think it unnecessary to embark upon a detailed analysis of that section, for union activity which is authorized by state labor law constitutes an exception to the criminal trespass statutes. (See Agricultural Labor Relations Bd. v. Superior Court, supra, 16 Cal. 3d 392, 421; *Lane,* supra, 71 Cal. 2d 872 (city trespass ordinance); cf. In re Zerbe (1964) 60 Cal. 2d 666

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canon of construction known as *ejusdem generis,*[10] subdivision (e)'s reference to "conduct that is unlawful" must be limited to conduct which constitutes breach of the peace, disorderly conduct, the blocking of access or egress, or other "similar unlawful activity." Peaceful picketing on private sidewalks because it does not involve violence or substantially impair the rights of others, is not conduct "similar" to the listed acts.[11]

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(construing Pen. Code, § 552.1.) In any event, the language of subdivision (b) of section 527.3 is explicit: union activity protected by that subdivision is not only not subject to injunction but "shall be legal," language which precludes any ruling that such activity constituted a criminal trespass. As a specific statute regulating labor disputes, section 527.3 would prevail over the earlier and more general criminal trespass laws. (See Agricultural Labor Relations Bd. v. Superior Court, supra, 16 Cal. 3d 392, 420.)

At oral argument the parties called our attention to an amendment to Penal Code section 602, subdivision (n). Under that amendment, effective January 1, 1979, a person does not violate subdivision (n) by refusing to leave property on the request of the owner, his agent, or the lawful possessor of the property, if the person is "engaged in lawful labor union activities which are permitted to be carried out on the property by the California Agricultural Labor Relations Act . . . or by the National Labor Relations Act." The parties recognize that this amendment merely codifies existing law; indeed union activity protected by state or federal labor law clearly does not violate any subdivision of Penal Code section 602.

10. "[T]he doctrine of *ejusdem generis* (also known as Lord Tenterden's rule) . . . states that where general words follow the enumeration of particular classes of persons or things, the general words will be construed as applicable only to persons or things of the same general nature or class as those enumerated. The rule is based on the obvious reason that if the Legislature had intended the general words to be used in their unrestricted sense, it would not have mentioned the particular things or classes of things which would in that event become mere surplusage." (Scally v. Pacific Gas & Electric Co. (1972) 23 Cal. App. 3d 806, 819; see Civ. Code, § 3534 ("Particular expressions qualify those which are general"); In re Johnson (1914) 167 Cal. 142.)

11. Sears argues that trespassory picketing involves a potential of violence (see Sears Roebuck & Co. v. San Diego Dist. Council of Carpenters, supra, 436 U. S. 180, 213 (conc. opn. of Powell, J.)); and that "acts . . . likely to produce violence in others" may constitute a breach of the peace (In re Brown (1973) 9 Cal. 3d 612. 617). This argument appears to be based on the assumption that

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We turn to Sears' contention that it has a federally protected right to enjoin picketing on its property which prevails over contrary state law. Sears first maintains that it enjoys such a right under the due process clause of the Fourteenth Amendment, citing for that proposition the Supreme Court decisions previously discussed in Lloyd Corp. v. Tanner, supra, 407 U. S. 551; Central Hardware Co. v. NLRB, supra, 407 U. S. 539; and Hudgens v. NLRB, supra, 424 U. S. 507. We concluded in Robins v. Pruneyard Shopping Center, supra, ... Cal. 3d ....., however, that the cited decisions did not involve a constitutionally protected right of property at all, but were concerned solely with whether the action of the landowner constituted "state action" under the Fourteenth Amendment. Consequently those decisions offer no support for Sears' claim that it enjoys a federal right to enjoin picketing on its premises.[12]

The Fourteenth Amendment, of course, does protect Sears against any state statute which takes property without due process of law. A statute is invalid under the due process clause of the Fourteenth Amendment, however, only if it lacks a "real or substantial relation to the public health safety, morals or general welfare." (Miller v. Board of Public Works (1925) 195 Cal. 477, 490; Associated Home Builders etc., Inc. v. City of Livermore (1976) 18 Cal. 3d 582, 604; see Agricultural Labor Relations Bd. v. Superior Court, supra, 16 Cal. 3d 392, 409-410.) The Moscone Act, although held to deny Sears the right to enjoin picketing on its premises under the facts of the instant case, is clearly valid under the foregoing standard; its purpose—the elimination of unnecessary judicial intervention

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the employer has and will exercise a right of self-help to eject the pickets. If the picketing is lawful, however, then the employer has no right to eject the pickets; the possibility that it may attempt to do so unlawfully and thereby precipitate violence is no basis for an injunction barring peaceful picketing.

12. Sears also asserts a constitutional right to access to the courts to enjoin illegal trespassing. (Cf. Boddie v. Connecticut (1971) 401 U. S. 371, 375-376.) The assertion falls with our holding that the union picketing at issue here is not illegal.

into labor disputes—indisputably bears a reasonable relationship to legitimate state objectives.

Finally, Sears argues that federal labor law grants it the right to bar union picketing on its premises under the circumstances of the instant case, and that such federal law must prevail over conflicting state statutes. Sears relies on NLRB v. Babcock & Wilcox, supra, 351 U. S. 105, which stated that an employer may validly post his property against nonemployee distribution of union literature if the employer does not discriminate against the union and the union has available channels of communication. (351 U. S. at p. 112.) *Babcock & Wilcox,* however, held nothing more than that an employer who adopts and enforces a nondiscriminatory no-solicitation rule does not commit an unfair labor practice. Nothing in the decision, or the federal statutes which it construes, confers on the employer an affirmative right to exclude union pickets unless such picketing constitutes an unfair labor practice. Sears does not contend here that the union picketing constituted an unfair labor practice and, in any event, such a contention must be raised before the National Labor Relations Board, not the state court. We therefore conclude that Sears can assert no claim based upon the federal Constitution, statutes, or cases which would require the California courts to enjoin the picketing in the present case.

In summary, the sidewalk outside a retail store has become the traditional and accepted place where unions may, by peaceful picketing, present to the public their views respecting a labor dispute with that store. Recognized as lawful by the decisions of this court, such picketing likewise finds statutory sanction in the Moscone Act, and enjoys protection from injunction by the terms of that act. In such context the location of the store whether it is on the main street of the downtown section of the metropolitan area, in a suburban shopping center or in a parking lot, does not make any difference. Peaceful picketing outside the store, involving neither fraud, violence,

breach of the peace, nor interference with access or egress, is not subject to the injunction jurisdiction of the courts.

The order granting a preliminary injunction is reversed.

TOBRINER, *J.*

We Concur:

BIRD. *C. J.*
MOSEK, *J.*

CONCURRING OPINION BY NEWMAN, J.

I agree that the injunction order should be reversed, and I concur in nearly all of Justice Tobriner's reasoning. He detects in the Moscone Act, however, certain ambiguities that to me do not seem to be confounding; and, unlike him, I do not believe that "the Legislature . . . intended the courts to continue to follow [all] principles of Califonria labor law extant at the time of the enactment of section 527.3." (Maj. opn., *ante,* at p. 19.)

NEWMAN, *J.*

DISSENTING OPINION BY CLARK, J.

I dissent.

I.

As pointed out in our earlier unanimous opinion in this case, picketing occurred only on Sears' parking lot areas immediately adjacent to walkways abutting the sides of the store building. (Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters (1976), 17 Cal. 3d 893, 896.) The record reveals that on at least one occasion, a picket stopped a car in the parking lot by stepping in front of it. No evidence exists of picketing on the walkways. Nevertheless, because the majority are determined to treat this case as if it involved picketing on a sidewalk, the dissent must address the issue.

II.

The Moscone Act expressly provides in Code of Civil Procedure section 527.3, subdivision (e): "It is not the intent of this section to permit conduct that is unlawful including breach of the peace, disorderly conduct, the unlawful blocking of access or egress to premises where a labor dispute exists, or other similar unlawful activity." Subdivision (a) provides that the provisions of subdivision (b)—dealing in part with picketing—are to be construed in accordance with "existing law." While this language may not have been part of the legislation as proposed, it is part of the legislation as enacted, and must be given effect by all—including this court. Conversely, the fact that the original proponents of the act sought to exempt certain union activity from criminal statutes, furnishes no justification

for refusing to enforce the clear legislative direction ultimately adopted.

The quoted language reinforced by legislative history makes clear that the Legislature in adopting the Moscone Act did not intend to exempt labor union conduct from existing criminal statutes. Indeed, it is difficult to see how the Legislature could have made its intent clearer. The majority's argument—that the Legislature intended to make exemptions to the trespass statutes by failing to expressly mention trespasses—must be rejected.

When the Legislature has sought to exempt labor union conduct from trespass statutes (e.g., Pen. Code, § 602), it has indicated both the conduct and property to be exempted (Pen. Code §§ 552-555.5, 602, subd. (n); In re Zerbe (1964) 60 Cal. 2d 666, 668 et seq.), or has authorized an administrative agency to adopt rules specifying the exempt property and conduct (Agricultural Labor Relations Bd. v. Superior Court (1976) 16 Cal. 3d 392, 426-429). In contrast to the above statutes, the Moscone Act clearly expresses no intent to make exemptions to existing criminal law. Obviously, absent legislative authorization, this court is not free to adopt exceptions to criminal statutes for favored groups.

Endeavoring to find in the Moscone Act an exemption from trespass statutes, the majority—relying on the act's reference to "existing law"—claim the reference includes two discredited decisions by this court. Both cases erroneously relied upon by the majority as declaring a right to picket on private walkways (Schwartz-Torrence Investment Corp. v. Bakery & Confectionery Workers' Union (1964) 61 Cal. 2d 766, and In re Lane (1969) 71 Cal. 2d 872) are premised on the ground that picketing on private property involves rights protected by the First Amendment. That doctrine has been repudicated.

In Hudgens v. N. L. R. B. (1976) 424 U. S. 507, the Supreme Court stated: " 'To hold that store owners are compelled by law to supply picketing areas for pickets to drive store customers away is to create a court-made law wholly dis-

regarding the constitutional basis on which private ownership of property rests in this country.' " (*Id.*, at p. 517.) Rejecting the claim that picketing on private property is entitled to constitutional protection, the court stated: "We conclude, in short, that under the present state of the law the constitutional guarantee of free expression has no part to play in a case such as this."[1] (*Id.*, at p. 521.)

Because the foundations of *Schwartz-Torrence* and *Lane* have been repudiated, those cases either alone or in conjunction with the Moscone Act furnish no basis for establishing a right to picket on private property.[2]

While I agree generally with the majority that the Moscone Act prohibits injunctions against lawful picketing as determined by prior law, the statutory codification of judge-made law does not include decisions based on erroneous constitutional doctrines, subsequently repudiated by the courts.

In Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 814, this court considered the specific codification of the contributory negligence doctrine—a common law or judicially created rule. The *Li* majority stated: "it was not the intention of the Legislature in enacting section 1714 of the Civil Code, as well as other sections of that code declarative of the common law, to insulate the matters therein expressed from further judicial development; rather it was the intention of the Legislature to announce and formulate existng common law principles and definitions for

1. In *Hudgens* the court stressed: " '[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.' " (Hudgens v. N. L. R. B., *supra,* 424 U. S. 507, 520.) Thus, if the First Amendment requires Sears to open its private property to pickets, it must open its private property to all who wish to exercise First Amendment rights including demonstrators, political candidates, handbill distributors, and business competitors.

2. Once we recognize that the constitutional bases of *Schwartz-Torrence* and *Lane* are repudiated, the cases must be repudiated in toto. Absent constitutional requirement or legislative direction, we simply may not make exceptions to criminal statutes.

purposes of orderly and concise presentation and with a distinct view toward continuing judicial evolution." On the basis of this analysis the majority concluded it was free to repudiate the codified contributory negligence rule in favor of what it deemed to be a correct, more equitable rule.[3]

As in *Li*, it may be assumed the Legislature when referring to "existing law" did not intend to freeze judicially declared law, especially when that law was based on erroneous constitutional doctrine.

Because the language of the act expressly demonstrates legislative intent not "to permit conduct that is unlawful," and because we have no authority to create exceptions from the cirminal trespass statutes, we may not authorize trespasses on private parking lots or private walkways.

The order granting preliminary injunctions should be affirmed.

CLARK, *J.*

I Concur:
MANUEL, *J.*

3. The Legislature, of course, is the proper governmental agency authorized to enact the laws of this state. If, however, in codifying judicially declared doctrine the Legislature intends to continue to recognize the judicial evolution of that doctrine then, as in *Li*, the courts may continue to develop and declare new concepts. They may do so, however, only because the Legislature intends that they do so. Should the Legislature express itself contrary to a judicially developed doctrine, courts are bound to give recognition to such expression of legislative intent.

DISSENTING OPINION BY RICHARDSON, J.

I respectfully dissent. I agree with Justice Clark's dissenting position to the effect that the majority has misread and misconstrued the Moscone Act (Code Civ. Proc., § 527.3) in holding that the act divests our courts of their historic and traditional equity jurisdiction to enjoin trespassory labor activities occurring on private property. In addition, however, it should be noted that the majority's interpretation of the act renders it *unconstitutional* under controlling United States Supreme Court decisions which hold that a private store owner enjoys a *federal* constitutional right to reasonable protection from such trespassory invasions.

Thus, during an earlier stage of the very proceedings now before us, the United States Supreme Court expressly stated that "Experience with trespassory organizational solicitation by nonemployees is instructive. . . . While *Babcock* [Labor Board v. Babcock & Wilcox Co. (1956) 351 U. S. 105] indicates that an employer may not always bar nonemployee union organizers from his property, *his right to do so remains the general rule.* To gain access, *the union has the burden of showing that no other reasonable means of communicating its organizational message to the employees exists* or that the employer's access rules discriminate against union solicitation. That the burden imposed on the union is a heavy one is evidenced by the fact that *the balance struck* by the [National Labor Relations] Board and the courts under the *Babcock* accommodation principle *has rarely been in favor of trespassory organizational activity.*

[¶] Even on the assumption that picketing to enforce area standards is entitled to the same deference in the *Babcock* accommodation analysis as organizational solicitation, *it would be unprotected in most instances.*" (Sears, Roebuck & Co. v. Carpenters (1978) 436 U. S. 180, 205-206, italics added and fns. omitted; see also Hudgens v. NLRB (1976) 424 U. S. 507; Central Hardware Co. v. NLRB (1972) 407 U. S. 539, 544-547.)

Thus, the high court has instructed us in unmistakable terms that trespassory picketing of the nature involved herein is probably unlawful under federal standards. Yet the majority wholly ignores these standards in determining whether California courts have jurisdiction to enjoin such activity. It is uncontradicted that in the present case the union has failed to carry its burden, under *Babcock,* of showing a lack of reasonable alternative means of communicating its message. Nevertheless, the majority upholds the union's activities solely in reliance upon a provision of *state* law which purportedly permits them to flourish unabated.

The majority's holding assumes that the foregoing federal principle of accommodation freely may be modified, subordinated or even wholly ignored at the whim of state courts or legislators. According to the majority, this federal principle "rest[s] upon a statutory and administrative basis not found in California law." (*Ante,* p. ..... [maj opn., at p. 19].) On the contrary, the federal principle discussed in *Babcock, Central Hardware* and *Hudgens* clearly is solidly founded upon the *private property rights* of the store owner, which rights derive not from any capricious or evanescent state statute or administrative ruling, but rather upon the rock-solid footing of the Fifth and Fourteenth Amendments to the United States Constitution. The accommodation principle painstakingly developed by the United States Supreme Court strikes a careful balance between the legitimate interests of organized labor and the constitutionality derived property rights of the owner. The high court in *Babcock*

insisted that "Accommodation between the two [interests] must be obtained with as little destruction of one as is consistent with the maintenance of the other." (351 U. S. at p. 112.) Further, *Central Hardware* teaches that "the principle of accommodation announced in *Babcock* is limited to labor organization campaigns, *and the 'yielding' of property rights it may require is both temporary and minimal.*" (407 U. S. at p. 545, italics added.)

In contrast with the Supreme Court's carefully circumscribed formulation, the majority interprets the Moscone Act as stripping from California courts any jurisdiction to apply the balancing test of the federal cases. The "balance" is struck, in advance and uniformly, in favor of trespassory labor activity whether or not reasonable alternative means of communication exist, and whether or not these activities involve only a "temporary and minimal" yielding of the store owner's property rights. As I have previously argued in a recent case involving similar federally protected rights of the private shopping center owner, the majority's sole reliance upon *state* statutory or constitutional provisions or policy is entirely misplaced. Where there are available other reasonable means of transmitting the union message, such trespassory activity must yield to the "paramount federal constitutional imperative" protecting the property interests of the landowner. (Robins v. Pruneyard Shopping Center (1979) 23 Cal. 3d 899, 916 (dis. opn.).)

I would affirm the order granting a preliminary injunction.

RICHARDSON, *J.*

I Concur:
CLARK, *J.*

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SEARS, ROEBUCK & COMPANY, *Plaintiff and Respondent,* *vs.* SAN DIEGO COUNTY DISTRICT COUNCIL OF CARPENTERS, *Defendant and Appellant.*	Appeal County San Diego Superior Court No. 347511

The above-entitled cause having been heretofore fully argued, and submitted, IT IS ORDERED, ADJUDGED, AND DECREED by the Court that the ORDER of the Superior Court of the County of San Diego in the above-entitled cause, granting a preliminary injunction is reversed.

I, Clerk of the Supreme Court of the State of California, do hereby certify that the foregoing is a true copy of an original judgment entered in the above-entitled cause on the 14th day of September, 1979.

WITNESS *my hand and the seal of the Court, this* 15th *day of* October, 1979.

Clerk

(SEAL)

By .....
Deputy

G. E. Schneider

APPENDIX C

CALIFORNIA CODE OF CIVIL PROCEDURE

§ 527.3 Labor Disputes; Jurisdiction of Court

(a) In order to promote the rights of workers to engage in concerted activities for the purpose of collective bargaining, picketing or other mutual aid or protection, and to prevent the evils which frequently occur when courts interfere with the normal processes of dispute resolution between employers and recognized employee organizations, the equtiy jurisdiction of the courts in cases involving or growing out of a labor dispute shall be no broader than as set forth in subdivision (b) of this section, and the provisions of subdivision (b) of this section shall be strictly construed in accordance with existing law governing labor disputes with the purpose of avoiding any unnecessary judicial interference in labor disputes.

(b) The acts enumerated in this subdivision, whether performed singly or in concert, shall be legal, and no court nor any judge nor judges thereof, shall have jurisdiction to issue any restraining order or preliminary or permanent injunction, which, in specific or general terms, prohibits any person or persons, whether singly or in concert, from doing any of the following:

(1) Giving publicity to, and obtaining or communicating information regarding the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling any public street or any place where any person or persons may lawfully be, or by any other method not involving fraud, violence or breach of the peace.

(2) Peaceful picketing or patrolling involving any labor dispute, whether engaged in singly or in numbers.

(3) Assembling peaceably to do any of the acts specified in paragraphs (1) and (2) or to promote lawful interests.

(4) Except as provided in subparagraph (iv), for purposes of this section, "labor dispute" is defined as follows:

(i) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (a) between one or more employers or associations of employers and one or more employees or associations of employees; (b) between one or more employers or associations of employers and one or more employers or associations of employers; or (c) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a "labor dispute" of "persons participating or interested" therein (as defined in subparagraph (ii).

(ii) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft. or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

(iii) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment regardless of whether or not the disputants stand in the proximate relation of employer and employee.

(iv) The term "labor dispute" does not include a jurisdictional strike as defined in Section 1118 of the Labor Code.

(c) Nothing contained in this section shall be construed to alter or supersede the provisions of Chapter 1 of the 1975-76 Third Extraordinary Session[1], and to the extent of any conflict between the provisions of this act and that chapter, the provisions of the latter shall prevail.

(d) Nothing contained in this section shall be construed to alter the legal rights of public employees or their employers, nor shall this section alter the rights of parties to collective-bargaining agreements under the provisions of Section 1126 of the Labor Code.

(e) It is not the intent of this section to permit conduct that is unlawful including breach of the peace, disorderly conduct, the unlawful blocking of access or egress to premises where a labor dispute exists, or other similar unlawful activity.

CALIFORNIA PENAL CODE

§ 602. Trespasses Constituting Misdemeanors; Enumeration

Every person who wilfully commits trespass by any of the following acts is guilty of a misdemeanor: * * *

(k) Posted lands. Entering any lands under cultivation or enclosed by fence, belonging to, or occupied by, another, or entering upon uncultivated or unenclosed lands where signs forbidding trespass are displayed at intervals not less than three to the mile along all exterior boundaries and at all roads and trails entering such lands without the written permission of the owner of such land, his agent or of the person in lawful possession, and

(1) Refusing or failing to leave such lands immediately upon being requested by the owner of such land, his agent or by the person in lawful possession to leave such lands, or

(2) Tearing down, mutilating, or destroying any sign, signboard, or notice forbidding trespass or hunting on such lands, or

(3) Removing, injuring, unlocking, or tampering with any lock on any gate on or leading into such lands, or

(4) Discharging any firearm.

(1) Occupation. Entering and occupying real property or structures of any kind without the consent of the owner, his agent, or the person in lawful possession thereof.

UNITED STATES CONSTITUTION

Article VI, Section 2:

This Constitution, and the laws of the United States which shall be made in pursuance thereof; . . . shall be the supreme law of the land, and the Judges in every State shall be bound thereby, any thing in the Constitution or laws of any State to the Contrary notwithstanding

Fifth Amendment:

No person shall . . . be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment:

[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . .

Supreme Court, U. S.
FILED
MAR 19 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-735

SEARS, ROEBUCK AND CO.,

Petitioner,

vs.

SAN DIEGO COUNTY DISTRICT COUNCIL OF CARPENTERS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

SUPPLEMENTAL BRIEF ON BEHALF OF PETITIONER

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SUPREME COURT OF CALIFORNIA

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF

Petitioner Sears, Roebuck and Co. ("Sears") moves, pursuant to Supreme Court Rule 41(5), for leave to file the annexed supplemental brief. Leave is sought to address *Kaplan's Fruit & Produce Co., Inc.* v. *Superior Court of Los Angeles County,* 26 Cal. 3rd 60, Sup., 160 Cal. Rptr. 745 (1979), which involves closely related matters decided by the Supreme Court of California, and several points raised in the brief filed by the United States as *amicus curiae* in the related case of *PruneYard Shopping Center* v. *Robins,* No. 79-289. These pertinent matters were unavailable in time to have been included in the Petition. Since each of these matters may have some bearing on the

Court's determination whether to grant the Petition, Sears respectfully requests leave to file a supplemental brief to present its views.

Respectfully submitted,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

SUPPLEMENTAL BRIEF ON BEHALF OF PETITIONER

This supplemental brief on behalf of Petitioner Sears, Roebuck and Co. ("Sears") is filed contingent upon the Court's granting the foregoing motion for leave to file a supplemental brief. The purpose of this brief is to address the recent decision of the California Supreme Court in *Kaplan's Fruit & Produce Co., Inc.* v. *Superior Court of Los Angeles County,* 26 Cal. 3rd 60, Sup., 160 Cal. Rptr. 745 (1979), reproduced as A hereto, and several points raised in the *amicus* brief filed by the United States in the related matter of *PruneYard Shopping Center* v. *Robins,* No. 79-289.

1. *Kaplan's,* like the instant case, involved the application of the Moscone Act, Cal. Code of Civ. Proc., §527.3, to labor

activities governed by the National Labor Relations Act, 29 U. S. C. § 151, *et seq.* Both cases also concerned similar conduct: trespassory picketing on private property in the present case and picketing which obstructed access to private property in *Kaplan's*. The result in the two cases, however, was dramatically opposite. Whereas in the instant dispute the California Supreme Court concluded that the Moscone Act foreclosed injunctive relief and mandated a finding that the picketing was "lawful activity" (Pet. App. A, p. A4), in *Kaplan's* the same Court concluded that a bar to an injunction would deny the employer "adequate relief." p. A20, *infra.* California has thus reasserted its right to utilize the Moscone Act—a law that expressly regulates labor-management relations—to impermissibly alter national labor policy.

Moreover, while *Kaplan's* acknowledges that "federal precedents serve to guide the construction" of California labor law, the California Supreme Court in the present case expressly refused to apply such precedents, in particular the approach adopted in *N. L. R. B.* v. *Babcock & Wilcox,* 351 U. S. 105 (1964). Cf. p. A15, *infra,* with Pet. App. A, p. A12. Indeed, the dichotomy between *Kaplan's* and the present case is all the more disturbing because the basis for the *Kaplan's* decision, *i.e.,* that picketing which is obstructive may "lead to violence" and thus should be enjoinable (Sup., 160 Cal. Rptr. at 755), parallels the rationale of this Court in its prior decision in this matter. See 436 U. S. at 202. In any event, any doubt as to the denial of alternative relief in this case, or the State's desire to impose its own concept of labor-management relations (See Response to Br. Op., pp. 2-3), has now surely been obviated.

2. Sears has argued that, although this Court has agreed to consider *PruneYard Shopping Center* v. *Robins,* No. 79-289, a grant of the present petition would permit a similarly desirable resolution of related, although different, issues. Pet., pp. 7-8. The United States, as *amicus curiae* in *PruneYard,* has now

likewise recognized that *PruneYard* "involves only petitioning unrelated to any concerns of the N. L. R. A." and not the questions raised in the present case, "whether or to what extent the N. L. R. A. may preempt application of the California Constitution to union speech and petitioning at privately owned shopping centers." Br. for the United States as *Amicus Curiae* in *PruneYard,* p. 13, n. 3. A concurrent review of both of these equally compelling issues is warranted.

CONCLUSION.

For the foregoing reasons, as well as those set forth in Sears' Petition and Response Brief, this petition for writ of certiorari should be granted.

Respectfully submitted,

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SEARS-SAN DIEGO

APPENDIX

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26 Cal. 3rd 60

Kaplan's Fruit & Produce Company, Inc.,
Petitioner,

vs.

Superior Court of Los Angeles County,
Respondent;

United Farm Workers of America, AFL-CIO,
Real Party in Interest.

SUPREME COURT OF CALIFORNIA, IN BANK.

Dec. 14, 1979.

TOBRINER, Acting Chief Justice.

In an agricultural labor dispute, petitioner Kaplan's Fruit & Produce Company, Inc. (Kaplan's) sought a preliminary injunction to restrain pickets of real party in interest United Farm Workers of America (Union) from obstructing ingress and egress to Kaplan's wholesale facility in Los Angeles.[1] The Superior court found "mass picketing which interferes with ingress and egress," but ruled that lacking evidence of violence or threat of violence it had no jurisdiction to grant injunctive relief. Kaplan's filed the instant petition for mandate to compel the superior court to issue a preliminary injunction.

Prior decisions of the United States Supreme Court and of the California courts establish the jurisdiction of local courts

1. We use the term "obstruction of access" to refer to obstruction of both ingress and egress.

to enjoin interference with access in a suit by a private litigant. The Union maintains, however, that two recent California statutes, the Agricultural Labor Relations Act (ALRA) (Lab. Code, § 1140 et seq.) and the Moscone Act (Code Civ. Proc., § 527.3) divest the superior court of such jurisdiction. We explain our reasons for rejecting that contention.

[1] Since the National Labor Relations Act (29 U. S. C. § 151 et seq.), served as the model for the ALRA, decisions interpreting the national act are persuasive in construing the California law. Those decisions hold that the exclusive jurisdiction of the NLRB to adjudicate charges of unfair labor practices does not preempt the power of the local court to enjoin obstructions to access; they indicate that, because blocking of customer access does not in itself constitute an unfair labor practice, an injunction restraining such conduct presents no significant risk of an impairment of board adjudication. Following the federal precedents, we construe the ALRA to permit superior courts to enjoin obstruction to access in private suits for injunctive relief.

In the Moscone Act, Code of Civil Procedure section 527.3, subdivision (b) bars injunctions against "peaceful picketing." Construing that language in light of existing law as required by subdivision (a) of the act, and in accord with subdivision (e)'s declaration of legislative intent not to permit unlawful obstruction of ingress and egress, we conclude that picketing which obstructs access is not "peaceful" picketing protected by the statute. Accordingly, we conclude that the act does not divest the superior court of jurisdiction to enjoin such picketing.

We decline, however, to mandate the superior court to issue a preliminary injunction as requested by Kaplan's. The record suggests that the court, because it believed it lacked jurisdiction to issue an injunction, did not carefully weigh the evidence and decide whether the facts required such relief. We therefore mandate the superior court to vacate its order denying a preliminary injunction, permitting it to reconsider, in light of this opinion, whether to grant the relief requested.

1. *Proceedings before the courts and the ALRB.*

The Union won a representation election at Kaplan's Porterville farm in 1975 and was certified as collective bargaining agent by the ALRB in January of 1976. Two years of bargaining failed to produce a collective bargaining agreement. In November 1977, the Union began picketing at Kaplan's wholesale outlet in Los Angeles.

On December 9, 1977, Kaplan's petitioned the superior court for injunctive relief and obtained a temporary restraining order. On December 20, 1977, the superior court heard Kaplan's request for a preliminary injunction. At the outset of the hearing, the court expressed the opinion that our decision in the first *Sears* case (*Sears, Roebuck & Co.* v. *San Diego County Dist. Council of Carpenters* (1976) 17 Cal. 3d 893, 132 Cal. Rptr. 443, 553 P. 2d 603, revd. (1978) 436 U. S. 180, 98 S. Ct. 1745, 56 L. Ed. 2d 209) might deprive it of jurisdiction to enjoin picketing absent evidence of violence. Argument before the superior court centered upon this issue, and neither party presented evidence, apart from affidavits filed previously, to show what occurred during the picketing. At the close of the hearing the court denied the request for injunctive relief, finding that there was "mass picketing which interferes with ingress and egress from petitioner's property but that there is insufficient evidence of violence or threat of violence to support a preliminary injunction."

When it filed its complaint in the superior court, Kaplan's also presented to the ALRB a charge of unfair labor practice. On February 17, 1978, the regional counsel for ALRB declined to issue a complaint, stating that the board's investigation revealed that "the UFW [Union] did *not* conduct mass picketing or block access to the Kaplan stand." Kaplan's appealed to the general counsel, who responded that "Investiga-

tion revealed that the picketing in front of charging party's premises was primary activity and that the manner in which it was conducted did not violate any provision of the ALRA."

Kaplan's then sought mandate from the Court of Appeal to compel the superior court to grant the preliminary injunction. The Court of Appeal issued an alternative writ, thereby determining that Kaplan's appellate remedy was inadequate.[2] The Court of Appeal subsequently issued a preemptory writ as prayed; we granted a petition for hearing.

Although its pleadings below speak in broader terms, Kaplan's answer to the petition for hearing in this court and its presentation at oral argument demonstrate that it does not seek to enjoin mass picketing apart from its effect in obstructing access to Kaplan's premises. We therefore limit our opinion to the question of superior court jurisdiction to enjoin obstruction of access.

2. *The Agricultural Labor Relations Act does not divest the superior court of jurisdiction to enjoin obstruction to access in a private action for injunctive relief.*

Labor Code section 1160.9 provides expressly that the procedures set forth in the ALRA "shall be the exclusive method of redressing unfair labor practices." Despite the absence from the NLRA of words conferring "exclusive jurisdiction" on the federal board, "The United States Supreme Court has interpreted the NLRA as providing the exclusive means of redressing unfair labor practices." (*Belridge Farms* v. *Agricultural Labor Relations Bd.* (1978) 21 Cal. 3d 551, 558, 147 Cal. Rptr. 165, 170, 580 P. 2d 665, 670.) "Thus," we concluded, "section 1160.9 simply constitutes a codification of existing federal law." (*Id.*)

Accordingly, in defining the scope of preemption under section 1160.9, we adhere to the Legislature's directive in Labor

2. See 5 Witkin, California Procedure (2d ed. 1971) page 3870 and cases there cited.

Code section 1148 to "follow applicable precedents of the National Labor Relations Act, as amended." As explained in *People* v. *Medrano* (1978) 78 Cal. App. 3d 198, 205, 144 Cal. Rptr. 217, 221: "In designating the NLRA precedents as guideposts, the ALRA apparently incorporates into California law the general features of the [federal] preemption doctrine." We therefore look to cases interpreting the NLRA as a guide to the determination of whether the ALRA preempts the power of superior courts to enjoin obstructions to access in a private suit.[3]

[2] The decisions of the United States Supreme Court interpreting the federal act establish the general principle that the NLRB has exclusive jurisdiction over conduct which arguably involves practices either *protected* or *prohibited* under the NLRA. (*San Diego Unions* v. *Garmon* (1959) 359 U. S. 236, 79 S. Ct. 773, 3 L. Ed. 2d 775.) Those decisions recognize, however, as an exception to the general rule of preemption, the power of local courts and agencies to adjudicate matters of particular local concern. (See *Auto Workers* v. *Wisconsin Board* (1956) 351 U. S. 266, 76 S. Ct. 794, 100 L. Ed. 1162 (violence); *Linn* v. *Plant Guard Workers* (1966) 383 U. S. 53, 86 S. Ct. 657, 15 L. Ed. 2d 582 (libel); *Farmer* v. *Carpenters*

3. The Union points out that Assem. Bill No. 3381, designed to amend section 1160.9 was introduced in the 1978 Legislature but was killed in committee. The bill would have amended section 1160.9 to read as follows:

"The procedures set forth in this chapter shall be the exclusive method of redressing unfair labor practices. However, neither this section, nor any other section of this part, shall preclude any person from directly seeking appropriate equitable relief from the courts of this state in situations involving mass picketing, blocking of entrances or exits, violence, and trespass."

The Union argues that the introduction and defeat of Assem. Bill No. 3381 indicates that the Legislature believes section 1160.9 does not permit private suits for equitable relief from blocking of access. We do not think that we can place much weight upon that argument. When a statute is uncertain or ambiguous, legislators favoring one construction may introduce bills embodying their views, but the failure of the Legislature to enact those bills does not prove that the Legislature rejects the proposed construction.

(1977) 430 U. S. 290, 97 S. Ct. 1056, 51 L. Ed. 2d 338 (infliction of emotional distress); *Sears, Roebuck & Co.* v. *Carpenters* (1978) 436 U. S. 180, 98 S. Ct. 1745, 56 L. Ed. 2d 209 (trespass).) The decisions specifically acknowledge that local courts and agencies retain jurisdiction over private actions to enjoin obstructions to access. (See *Auto Workers* v. *Wisconsin Board, supra,* 351 U. S. 266, 274, 76 S. Ct. 794, 100 L. Ed. 1162, *Youngdahl* v. *Rainfair, Inc.* (1957) 355 U. S. 131, 78 S. Ct. 206, 2 L. Ed. 2d 151.)

In *Auto Workers,* the Wisconsin Employment Relations Board enjoined the Union from, among other matters, "Obstructing or interfering in any way with entrance to and egress from the premises of [the employer.]" (351 U. S. at pp. 269-270, fn. 3, 76 S. Ct. at 797, fn. 3.) The Supreme Court noted that the union's conduct, to the extent that it coerced employees, was an unfair labor practice, and that as a general rule states may not enjoin conduct which constitutes unfair labor practices. "But . . . this general rule does not take from the States power to prevent mass picketing, violence, and overt threats of violence." (P. 274, 76 S. Ct. p. 799.) The court affirmed the injunction.[4]

Youngdahl v. *Rainfair, supra,* 355 U. S. 131, 78 S. Ct. 206, 2 L. Ed. 2d 151, involved a state court injunction against intimidation, against "obstructing . . . the free ingress and egress to and from [the employer's] property," and against all " 'picketing or patrolling' of the employer's premises." (355 U. S. at p. 132, 78 S. Ct. at p. 208.) The opinion declares the injunction barring all picketing overbroad, but carefully distinguishes and affirms

4. The *United Auto Workers* case affirmed an injunction issued by a state labor board. That fact, however, does not distinguish the case from the present proceeding. The Supreme Court ruled that Wisconsin had authority to provide for injunctions against violent or obstructive conduct; "that Wisconsin has chosen to entrust its power to a labor board is of no concern to this Court." (351 U. S. at p. 275, 76 S. Ct. at p. 799.) The high court's subsequent decision in *Youngdahl* v. *Rainfair, supra,* 355 U. S. 131, 78 S. Ct. 206, 2 L. Ed. 2d 151, affirmed an injunction by a trial court.

the portion of the injunction barring intimidation and obstruction. (355 U. S. at p. 139, 78 S. Ct. 206.)[5]

Following *United Auto Workers* and *Youngdahl,* the Supreme Court in *San Diego Unions* v. *Garmon, supra,* 359 U. S. 236, 79 S. Ct. 773, 3 L. Ed. 2d 775, explained that the issue of preemption must be broken into two parts: activities arguably protected by the NLRA, and activities arguably prohibited by that act. (359 U. S. at pp. 244-245, 79 S. Ct. 773.) Subsequent cases further clarify the proposition that the preemption issue as to both categories turns primarily on whether preemption is necessary to avoid conflicting adjudications which would interfere with the regulatory activity of the administrative board. (See *Sears, Roebuck & Co.* v. *Carpenters, supra,* 436 U. S. 180, 197, 98 S. Ct. 1745, 56 L. Ed. 2d 209; *Farmer* v. *Carpenters, supra,* 430 U. S. 290, 305, 97 S. Ct. 1056, 51 L. Ed. 2d 338; *Motor Coach Employees* v. *Lockridge* (1971) 403 U. S. 274, 285, 91 S. Ct. 1909, 29 L. Ed. 2d 473.)

We shall explain that cases involving alleged obstruction of customer access do not present a significant danger of conflicting adjudications, and thus do not require interposition of a rule of

5. California decisions construing the NLRA in turn acknowledge that federal law does not preempt local court jurisdiction to enjoin obstruction to access. In *Sears, Roebuck & Co.* v. *Carpenters* (1976) (17 Cal. 3d 893, 903-904, 132 Cal. Rptr. 443, 451, 553 P. 2d 603, 611 (revd. on other grounds, 436 U. S. 180, 98 S. Ct. 1745, 56 L. Ed. 2d 209) we stated that "despite the *Garmon* rule, power was reserved to the states to prevent mass picketing, violence, threats of violence and obstructions to ingress and egress which threatened public health and safety."

Apparently the superior court in the instant case construed the language quoted from the *Sears* opinion—in particular the phrase "mass picketing, violence, threats of violence and obstructions to ingress and egress" (17 Cal. 3d 893, 904, 132 Cal. Rptr. 443, 451, 553 P. 2d 603, 611)—to mean absent violence or threats of violence the court lacked power to enjoin obstructions to access. That reading of *Sears* is plainly incorrect. The court need not find the presence of all the listed activities before it can enjoin any one of them. Indeed, the Union here concedes that federal decisions permit a state court to enjoin obstructions to access even in the absence of violence, just as it could obviously enjoin violence even without obstructions to access.

preemption depriving the superior courts of jurisdiction. Following the lead of the United States Supreme Court, we analyze this issue in two parts, first considering the doctrine of preemption as it relates to arguably *protected* activities, then the doctrine as it relates to arguably *prohibited* activities.

[3] The doctrine of preemption of arguably protected activity, we observe, does not apply to the present case. Obstruction of access is not protected by the ALRA; a court injunction barring such acts, so long as it does not bar legitimate union conduct, invades no right of the union under the act.

[4] The ALRB nevertheless contends that the present case does involve arguably protected activity. It points out that if the Union were in fact innocent of the charge of obstructing access, its picketing would be safeguarded by the ALRA. Since the parties dispute whether the Union did obstruct access, the ALRB reasoned that the case therefore "arguably" involves protected activity.

The ALRB's argument is unsound. Preemption arises only when the court is asked to regulate or enjoin conduct which arguably falls within the act's protection. (*San Diego Building Trades Council* v. *Garmon, supra,* 359 U. S. 236, 244-245, 79 S. Ct. 773, 3 L. Ed. 2d 775); here Kaplan's seeks only to enjoin obstruction of access, a clearly unprotected activity. The possibility that the Union is innocent of the charged conduct may be grounds for denying injunctive relief, but it does not invoke the preemptive jurisdiction of the board. Indeed, whenever any accusation is brought against a union, the charge may be groundless—the union may have engaged only in protected conduct—but to rest preemptive jurisdiction on that possibility would project the board's preemptive jurisdiction into all cases of charges against a union, rendering the arguably prohibited branch of the preemption doctrine superfluous.

We conclude that so long as the court's injunction does not restrain conduct which is arguably protected by the ALRA, it

does not invade the ALRB's preemptive jurisdiction to adjudicate controversies concerning arguably protected activity.[6] The doctrine of preemption of "arguably protected" activity thus does not preclude superior court injunctions limited to restraints upon obstruction to access.

The doctrine of preemption of arguably *prohibited* conduct has greater relevance than that of arguably protected conduct, because obstruction to access under some circumstances does constitute an unfair labor practice. In such a case, the United States Supreme Court explains, the preemption issue turns on "whether the controversy presented to the state court is identical to . . . or different from . . .that which could have been . . . presented to the Labor Board. For it is only in the former situation that a . . . court's exercise of jurisdiction necessarily involves a risk of interference with the unfair labor practice jurisdiction of the Board which the arguably prohibited branch of the *Garmon* doctrine was designed to avoid." (*Sears, Roebuck & Co.* v. *San Diego Dist. Council of Carpenters, supra,* 436 U. S. 180, 197, 98 S. Ct. 1745, 1758, 56 L. Ed. 2d 209.) As we shall explain, the issue which may be presented to the labor board in a case of obstruction of access is different from, and far narrower than, the issue which may be presented to the superior court.

[5] Picketing which obstructs access may be an unfair labor practice under Labor Code section 1154, subdivision (a)(1), to the extent that it restrains or coerces nonstriking employees in the exercise of their right to refrain from concerted activities guaranteed by section 1152.[7] (Cf. *N. L. R. B.* v. *United Mine*

6. See generally the discussion of the arguably protected basis for federal preemption in the dissenting opinion of Justice Brennan in *Sears, Roebuck & Co.* v. *San Diego Dist. Council of Carpenters, supra,* 436 U. S. 180, 221-228, 98 S. Ct. 1745, 56 L. Ed. 2d 209.

7. Under section 1154, subdivision (a)(1), it is an unfair labor practice for a union or its agents "To restrain or coerce . . . Agricultural employees in the exercise of the rights guaranteed in Section 1152." Section 1152 provides that "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to

(Footnote continued on next page.)

Workers of America (3d Cir. 1970) 429 F. 2d 141, construing a similar federal provision.) In the present case, some evidence indicates that the Union's picket line interfered with nonstriking Kaplan's employees, but that obstruction is a minor facet of the controversy; the principal objective of the pickets, and of the alleged interference to access, was to persuade prospective *customers* not to do business with Kaplan's.[8]

No provisions of the ALRA expressly declares obstruction of customers' access to be an unfair labor practice. The Union and the ALRB rest their claim that such conduct constitutes an unfair labor practice on section 1154, subdivision (d), which states in part that it is an unfair labor practice for a union "to threaten, coerce, or restrain any person; where . . . an object thereof is . . . the following: . . . (2) Forcing or requiring any person to cease using, selling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person. . . ."[9]

(Footnote continued from preceding page.)
bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities. . . ."

8. The United States Supreme Court decisions cited earlier (*United Auto Workers* v. *Wisconsin Employment Relations Board,* 351 U. S. 266, 274, 76 S. Ct. 794, 100 L. Ed. 1162, *Youngdahl* v. *Rainfair,* 355 U. S. 131, 139, 78 S. Ct. 206, 2 L. Ed. 2d 151) permitted courts to enjoin obstructions to access even though such obstruction hindered employees as well as customers, and thus may have constituted an unfair labor practice.

9. We quote the relevant language of section 1154: "It shall be an unfair labor practice for a labor organization or its agents . . .

"(d) To do either of the following: (i) To engage in, or to induce or encourage any individual employed by any person to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services; or (ii) to threaten, coerce, or restrain any person; where in either case (i) or (ii) an objection thereof is any of the following:

"(2) Forcing or requiring any person to cease using, selling, transporting, or otherwise dealing in the products of any other

(Footnote continued on next page.)

Read literally, this language is broad enough to ban acts which impede or prevent customers from doing business with a struck employer.

The United States Supreme Court, however, has authoritatively construed substantially identical language in section 8(b)(4) of the federal act (29 U. S. C. § 158(b)(4) as inapplicable to primary picketing.[10] In *National Labor Relations Board* v. *International Rice Milling Co.* (1951) 341 U. S. 665, 71 S. Ct. 961, 95 L. Ed. 1277, the court found no unfair labor practice although pickets obstructed access and threw stones to induce customers to refuse to pick up orders. The Congressional history of the act, the court noted, demonstrated that section 8(b)(4) was designed solely as a prohibition against secondary picketing. The court therefore concluded that "In the instant case the

(Footnote continued from preceding page.)
producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees. Nothing contained in this paragraph shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing."

10. Section 8(b) of the NLRA states that "It shall be an unfair labor practice for a labor organization or its agents . . .

"(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is . . .

"(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing; . . ."

violence on the picket line is not material. . . . The substitution of violent coercion in place of peaceful persuasion would not in itself bring the complained-of conduct into conflict with § 8(b)(4)." (341 U. S. at p. 672, 71 S. Ct. at p. 964-965.) Complaints of violence, the court states, must either be based on section 8(b)(1)(A) [coercion of employees], or "addressed . . . to local authorities." (*Ibid.*) In short, the court ruled that primary picketing, whether peaceful, obstructive, or violent, did not violate section 8(b)(4). (See generally 18G Kheel, Labor Law, § 36.01.) In 1959 Congress codified this holding by adding a proviso to section 8(b)(4) barring any construction of the section which would "make unlawful, where not otherwise unlawful, any primary strike or primary picketing."

The relevant language of California Labor Code section 1154 almost parallels that of NLRA section 8(b)(4), including the amendment protecting primary picketing. In *Belridge Farms* v. *Agricultural Labor Relations Bd., supra,* 21 Cal. 3d 551, 557, 147 Cal. Rptr. 165, 169, 580 P. 2d 665, 669, we observed that: "This court has long recognized the principle of statutory construction that '[W]hen legislation has been judicially construed and a subsequent statute on the same or an analogous subject is framed in the identical language, it will ordinarily be presumed that the Legislature intended that the language as used in the later enactment would be given a like interpretation. This rule is applicable to state statutes which are patterned after the federal statutes. [Citations.]' "

[6] Moreover, Labor Code section 1148 directs the ALRB to follow "applicable precedents of the National Labor Relations Act, as amended." California decisions have confirmed the importance of pertinent federal precedent to the construction of the California Act. (See *Agricultural Labor Relations Bd.* v. *Superior Court* (1976) 16 Cal. 3d 392, 404, fn. 5, 128 Cal. Rptr. 183, 546 P. 2d 687; *People* v. *Medrano, supra,* 78 Cal. App. 3d 198, 205, 144 Cal. Rptr. 217; *United Farm Workers* v. *Superior Court* (1977) 72 Cal. App. 3d 268, 273, 140 Cal.

Rptr. 87.) We therefore conclude that the California Legislature, when it adopted section 1154, subdivision (d), intended that provision to be construed in accordance with the federal precedents construing section 8(b)(4) of the NLRA.[11]

[7] Under that construction, the blocking of access by union pickets constitutes an unfair labor practice under section 1154 only if it coerces employees in violation of subsection (a)(1) of section 1154 or if it occurs in connection with an unlawful secondary boycott. Obstruction of access of customers by a primary picket line is not an unfair labor practice under the ALRA. Consequently, the only issues which the employer can present to the ALRB are much narrower than the issue he can bring before the superior court; and an injunction obtained at the behest of the ALRB barring only unfair labor practices would not provide the employer with the full relief to which he is entitled.

The Union argues that the foregoing analysis, based on decisions of the United States Supreme Court defining preemption under the NLRA, is inapposite. The Supreme Court decisions, it contends, recognized exceptions to the exclusive jurisdiction of the NLRB only out of respect for the sovereign rights of the states in a federal system. Such deference to principles of fed-

11. The Union acknowledges that section 8(b)(4) of the NLRA prohibits only activity with an illegal object—a secondary boycott. It argues that "the analogous ALRA language necessarily regulates *both* conduct and objects, because the ALRA generally permits secondary activity. . . . Under the NLRA, that language need only reach the object, but the fact that the object is permitted under the ALRA requires that language to forbid misconduct in pursuit of an illegal object." (Emphasis added.) It concludes that section 1154(d) of the ALRA, unlike section 8(b)(4) of the NLRA, prohibits obstructions to access in strikes with legal objectives.

Whatever the merits of the Union's argument as applied to a secondary boycott, the present case involves primary picketing. We cannot infer from the fact that the ALRA permits certain secondary picketing that the Legislature, when it adopted the language of the federal act, intended to depart from the established interpretation of that language and to create new unfair labor practices in the conduct of primary activity.

eralism, the Union concludes, can play no part in the present jurisdictional controversy between the ALRB, a state agency, and state superior courts.

Although concern for principles of federalism influenced the Supreme Court's initial decisions to permit exceptions to the preemptive reach of the NLRA (see *San Diego Building Trades Council* v. *Garmon, supra,* 359 U. S. 236, 247, 79 S. Ct. 773, 3 L. Ed. 2d 775; *Auto Workers* v. *Wisconsin Board, supra,* 351 U. S. 266, 76 S. Ct. 794, 100 L. Ed. 1162), the contours of the preemption doctrine have been largely shaped by a different consideration; the need to avoid conflicting decisions between the NLRB and the courts. (See p. 750 of 160 Cal. Rptr. p. ..... of ..... P. 2d, ante and cases there cited.) Consequently the courts have applied the preemption doctrine even in cases in which respect for state rights has no part, such as controversies between the NLRB and the federal courts. (See *Motor Coach Employees* v. *Lockridge, supra,* 403 U. S. 274, 286, 91 S. Ct. 1909, 29 L. Ed. 2d 473; *Abrams* v. *Carrier Corporation* (2d Cir. 1970) 434 F. 2d 1234.) Such principles by analogy may also serve to guide us in the resolution of controversies between California agencies and California courts.

The problem which faces federal courts in NLRA preemption cases is identical to that which faces California courts in ALRA preemption cases. Both federal and state courts seek to avoid conflicting adjudications which may interfere with the board's ability to carry out its statutory role, yet to permit court action when the board cannot provide a full and effective remedy. Over a period of more than 30 years, the federal courts have evolved guidelines to resolve such controversies. We believe that Labor Code section 1148 permits—indeed mandates—us to follow the federal precedents.

We summarize our reasoning on the subject of preemption. Federal decisions hold that the NLRA does not preempt local court jurisdiction to enjoin obstructions to access. Although those decisions rest in part upon principles of federalism, they

rest also on the fact that, since obstruction of access is not necessarily an unfair labor practice, decisions of local courts do not present a substantial danger of interference with NLRB adjudication. The provisions of the ALRA largely parallel those of federal law; federal precedents serve to guide the construction of the California law. Following those precedents, we conclude that blockage of customer access is not in itself an unfair labor practice under the ALRA and hence that under the ALRA, as under the NLRA, local court decisions enjoining obstructions to access do not threaten significant interference with labor board adjudications. We therefore hold that the ALRA does not divest the superior courts of jurisdiction, in a suit by private parties, to enjoin obstructions to access.

3. *Code of Civil Procedure section 527.3 does not deprive the superior court of jurisdiction to enjoin obstructions to access.*

The Union contends that under the Moscone Act (Code Civ. Proc., § 527.3) the superior courts lack jurisdiction to enjoin obstructions to access.[12] In effect, the Union argues, the employer's only remedies for such obstruction lie in criminal prosecution or in a tort action for damages.

As we explained in our second *Sears* opinion: "The Moscone Act was a compromise measure. The original bill, drafted by union attorneys, clearly sought to limit the injunctive jurisdiction of the superior court. The act declared its purpose expressly: to prevent 'the evils which frequently occur when courts

12. Subdivision (c) of section 527.3 provides that the section shall not be construed to alter or supersede the provisions of the ALRA. Since the ALRA, in Labor Code section 1160.4, expressly authorizes the board to seek injunctive relief in the superior court against an unfair labor practice, the Moscone Act cannot be construed to deny the superior court the power to grant such relief on request by the ALRB. Consequently the Union's contention that the Moscone Act limits the equity jurisdiction of the superior courts must be read as limited to a contention that it limits the court's jurisdiction to grant relief at the behest of litigants other than the ALRB.

interfere with the normal processes of dispute resolution between employers and recognized employee organizations.' (Code Civ. Proc., § 527.3, subd. (a).) The Legislature amended the bill to add provisions proposed by management supporters without, however, deleting any of the original provisions. In section 527.3 as finally enacted, the provisions added by amendment strike a discordant stance from those surviving from the original draft, thus creating difficult problems of statutory interpretation." (*Sears, Roebuck & Co.* v. *San Diego County Dist. Council of Carpenters* (1979) 25 Cal. 3d 317, 323, 158 Cal. Rptr. 370, 374-375, 599 P. 2d 676, 680-681 (fn. omitted).)

In the present case the problem is to construe and reconcile the language of subdivision (b) with the original draft and subdivision (e) which was added by amendment. Subdivision (b) provides as follows:

"The acts enumerated in this subdivision, whether performed singly or in concert, shall be legal, and no court nor any judge nor judges thereof, shall have jurisdiction to issue any restraining order or preliminary or permanent injunction which, in specific or general terms, prohibits any person or persons, whether singly or in concert, from doing any of the following:

"(1) Giving publicity to, and obtaining or communicating information regarding the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling any public street or any place where any person or persons may lawfully be, or by any other method not involving fraud, violence or breach of the peace.

"(2) Peaceful picketing or patrolling involving any labor dispute, whether engaged in singly or in numbers.

"(3) Assembling peaceably to do any of the acts specified in paragraphs (1) and (2) or to promote lawful interests."

Subpart (2) of this subdivision thus declares that "peaceful picketing," whether "singly or in numbers" is legal and hence not subject to injunction; subpart (1) similarly bars injunctions

against publicizing a labor dispute by "patrolling" or "any other method not involving fraud, violence or breach of the peace." The Union contends that the subdivision impliedly bars injunction against blocking of access unaccompanied by violence or threat of violence.[13]

Subdivision (e), however, expressly mentions obstructions to access; it provides that "It is not the intent of this section [section 527.3] to permit conduct that is unlawful including breach of the peace, disorderly conduct, *the unlawful blocking of access or egress to premises where a labor dispute exists,* or other similar unlawful activity." (Emphasis added.) Kaplan's maintains that the explicit reference to obstructions to access in subdivision (e) prevails over the more general language of subdivision (b), and preserves court jurisdiction to enjoin obstructions.

[8] As in the second *Sears* opinion (*Sears, Roebuck & Co.* v. *San Diego County Dist. Council of Carpenters,* supra, 25 Cal. 3d 317, 325, 158 Cal. Rptr. 370, 599 P. 2d 676), we turn for guidance in our interpretation of the Moscone Act to the legislative directive that "the provision of subdivision (b) [of the act] . . . shall be strictly construed in accordance with existing law governing labor disputes with the purpose of avoiding any unnecessary judicial interference in labor disputes." (Code Civ. Proc., § 527.3, subd. (a).)

"Existing law," in this case, clearly recognizes the power of superior courts to enjoin obstructions to access. (See *United*

13. The Union does not discuss whether picketing which obstructs access constitutes a "breach of the peace" within the meaning of section 527.3, subdivision (b). In *In re Bushman* (1970) 1 Cal. 3d 767, 773, 83 Cal. Rptr. 375, 378, 463 P. 2d 727, 730, we defined "breach of the peace" to mean "disruption of public order by acts that are themselves violent or that tend to incite others to violence." Since blocking of access will often provoke violence from the persons obstructed, such conduct may often fall within the foregoing definition, in which case injunctive relief is expressly permitted by subdivision (b). The fact that subdivision (e) separately lists "breach of the peace" and "blocking of access or egress," however, argues against any holding that obstruction to access necessarily constitutes a breach of the peace under subdivision (b).

Farm Workers of America v. *Superior Court* (1976) 16 Cal. 3d 499, 505, 128 Cal. Rptr. 209, 546 P. 2d 713; *United Farm Workers Organizing Committee* v. *Superior Court* (1971) 4 Cal. 3d 556, 572, fn. 30, 94 Cal. Rptr. 263, 483 P. 2d 1215; *California Retail Liquor Dealers Institute* v. *United Farm Workers* (1976) 57 Cal. App. 3d 606, 610-611, 129 Cal. Rptr. 407; *Pezold* v. *Amalgamated etc. Workmen* (1942) 54 Cal. App. 2d 120, 126-127, 128 P. 2d 611; *Chrisman* v. *Culinary Worker's Local* (1941) 46 Cal. App. 2d 129, 133, 115 P. 2d 553.) As the court explained in *Pezold* v. *Amalgamated etc. Workmen, supra,* 54 Cal. App. 2d 120, 126-127, 128 P. 2d 611, 615, "The defendants have a right to use the public sidewalk in front of plaintiff's market for the purpose of spreading their propaganda. Plaintiff has a right to have his customers use the sidewalk for the purpose of entering and leaving his market. Neither right is exclusive; each may, fortunately, be exercised without a denial of the other. . . . Defendants' use of the sidewalk may not be prohibited, but there may be a limitation placed upon the number using it and the manner of use, so that there is neither intimidation nor undue interference with its use by plaintiff's customers."

The recent Court of Appeal decision in *International Molders etc. Union* v. *Superior Court* (1977) 70 Cal. App. 3d 395, 138 Cal. Rptr. 794, found the prior authority persuasive in construing section 527.3. Upholding a temporary restraining order which barred use of more than two pickets within 20 feet of any entrance or exit, the court stated that "The law enunciated in section 527.3 does not in our view differ from the case law in this area. . . . Nothing in section 527.3, subdivision (b), prevents a court from placing reasonable restrictions on picketing where, as here, the absence of such restrictions has resulted in threats of violence and interference with access and with freedom of movement." (70 Cal. App. 3d at pp. 402, 406, 138 Cal. Rptr. at pp. 798, 800.)

[9, 10] Interpreting subdivision (b) in light of the existing case law, we conclude that picketing which obstructs access, because of its tendency to lead to violence, is not the "peaceful picketing" immunized from injunction by the subdivision. So construed, subdivision (b) accords with subdivision (e) of the act; the act taken as a whole does not bar superior courts from enjoining obstructions to access.[14]

The Union offers an alternative interpretation to reconcile subdivisions (b) and (e) of section 527.3. It proposes that subdivision (b) limits the equity jurisdiction of the superior court, divesting it of power to enjoin obstructions to access, while subdivision (e) by condemning as "unlawful" such obstructions preserves the possibility of redress through tort actions or criminal prosecutions. The Union's proposal compels a strained construction of subdivision (b). That subdivision states that the acts there enumerated—essentially peaceful picketing not involving fraud, violence, or breach of the peace—"shall be legal." The ordinary, common sense meaning of this declaration is that such acts are lawful. From that construction it follows that the obstruction of access, being unlawful both under prior law and subdivision (e), does not fall within the conduct protected by subdivision (b). Under the Union's interpretation, when the Legislature declared an act to be "legal," it did not mean that such acts were "lawful," but that they are subject to the jurisdiction of courts of common law instead of equity. We think it improbable that the Legislature intended to use the term "legal" in such a narrow, technical, and unusual fashion.

[11] We doubt that the Legislature intended by enactment of section 527.3 to leave employers with an action for damages as their sole remedy against obstructions to access. The pre-

14. We recognize that subdivision (a) of section 572.3 requires construction in accordance with existing law "with the purpose of avoiding any unnecessary judicial interference in labor disputes." Whether "judicial interference" by means of injunctive relief is "unnecessary" in a case involving blocking of access is a matter which turns on the facts of the case, and must be left to the discretion of the trial court.

requisite for injunctive relief against blocking of access rests upon a showing that in the absence of restraint the employer will suffer irreparable injury (see Code Civ. Proc., § 526, subd. 2; *E. H. Renzel Co.* v. *Warehousemen's Union* (1940) 16 Cal. 2d 369, 373, 106 P. 2d 1) or, equivalently that the remedy in damages is inadequate (see Civ. Code, § 3422; Code Civ. Proc., § 526, subd. 4; *Burnett* v. *Whitesides* (1859) 13 Cal. 156). Thus under present law injunctions issue to restrain blocking of access only when the superior court finds an inadequacy of a damage remedy. To relegate the employer to his remedy at common law is, under such circumstances, to deny him adequate relief.

Clear statutory language, or a precise showing of legislative intent, might nevertheless compel the conclusion that the statute deprives courts of the power to enjoin obstructions to access. As we noted earlier, however, the only place at which section 527.3 expressly refers to obstructions to access is subdivision (e); that section declares that it is not the intent of the Legislature to permit unlawful blocking of access and egress. Subdivision (b), under which the Union claims immunity from injunction, refers merely to "peaceful picketing," a phrase which can reasonably be construed to exclude blocking of access. Although legislative history records the compromise character of the enactment, it offers no support for the Union's assertion that subdivision (e) does not limit the scope of subdivision (b) but merely preserves an inadequate remedy at law. Accordingly, we conclude that section 527.3 does not deprive superior courts of jurisdiction in a proper case to enjoin obstruction of access.

4. *Disposition of the present proceeding.*

Because the superior court erroneously concluded that it lacked jurisdiction to enjoin blocking of access, we must issue a writ of mandate to direct the court to vacate that order. The superior court, however, also render a finding, unnecessary to its disposition of the case, that the Union had engaged in mass picketing

which obstructed access. On the basis of that finding Kaplan's asks us to direct the superior court to issue a preliminary injunction.

The superior court's finding of blocking of access rested solely on the basis of conflicting affidavits. Neither party presented other evidence on the issue; the parties restricted their oral argument before the trial court to the question of the court's jurisdiction. In view of the court's conclusion that it lacked jurisdiction, it gratuitously and unnecessarily rendered its finding on the alleged blockage. As we noted earlier, an independent ALRB investigation by the regional counsel concluded that no obstruction of access occurred. The record before us thus creates a strong impression that the superior court, believing it lacked jurisdiction to enjoin blocking of access, did not engage in the process of weighing the evidence and considering the arguments in order to determine whether such alleged obstruction occurred.[15]

[12] Finally, we emphasize the distinction between the peaceful picket line and the coercive one. The mass picket line that obstructs access to an employer's premises cannot be subsumed under the principles that apply to the peaceful picket line. The efficacy of the former relies upon the application of force; the latter, upon persuasion; the mantle of legality of the peaceful line does not cover the coercive line. We therefore urge trial courts to bear in mind our cautioning word that "Given the presumptively protected status of peaceful picketing activities, courts should be cautious in entertaining actions to enjoin or restrain such conduct" (*United Farm Workers of America* v. *Superior Court, supra,* 16 Cal. 3d 499, 505, 128 Cal. Rpt. 209, 213, 546 P. 2d 713, 717); injunctions should "be couched in

15. The preamble to the Moscone Act observes that "Equity procedure that permits a complaining party to obtain sweeping injunctive relief . . . that issues after hearing based upon written affidavits alone and not wholly or in part upon examination, confrontation and cross-examination of witnesses in open court, is peculiarly subject to abuse in labor litigation." (Stats. 1975, ch. 1156, p. 2845, § 1.)

the narrowest terms that will accomplish the pinpointed objective permitted by constitutional mandate and the essential needs of the public order" (*id.*, at p. 504, 128 Cal. Rptr. at p. 212-213, 546 P. 2d at p. 716-717). Because temporary restraining orders and preliminary injunctions in labor disputes may often have the effect of determining and terminating the entire controversy (see *McKay* v. *Retail Auto. S. L. Union No. 1067* (1940) 16 Cal. 2d 311, 330, 106 P. 2d 373; *United Farm Workers of America* v. *Superior Court* (1975) 14 Cal. 3d 902, 913, 122 Cal. Rptr. 877, 537 P. 2d 1237), "judicially imposed restraints . . . must be tailored with caution and precision, and be reserved for those cases in which the threat of harm seems clear and imminent" (*United Farm Workers of America* v. *Superior Court, supra,* 16 Cal. 3d 499, 506, 128 Cal. Rptr. 209, 214, 546 P. 2d 713, 718).

Let a peremptory writ of mandate issue directing respondent to vacate its order denying Kaplan's motion for preliminary injunction. Upon vacation of that order, and pursuant to the views expressed herein, the court shall determine whether to grant a preliminary injunction, and if it does so to fix its terms and provisions. Let a peremptory writ of mandate issue directing respondent to vacate its order denying Kaplan's motion for preliminary injunction. Upon vacation of that order, and pursuant to the views expressed herein, the court shall determine whether to grant a preliminary injunction, and if it does so to fix its terms and provisions.

MOSK, MANUEL and COBEY (Assigned by the Acting Chairperson of the Judicial Council), JJ., concur.

CLARK and RICHARDSON, JJ., concur in the judgment.

NEWMAN, Justice, concurring.

The words of the Moscone Act that I think encase the Legislature's intent are these (italics added):

"(a) In order to promote the rights of workers to engage in concerted activites for the purpose of . . . picketing . . . , and

to prevent the evils which frequently occur when courts interfere with the normal processes of dispute resolution between employers and recognized employee organizations, *the equity jurisdiction of the courts in cases involving or growing out of a labor dispute shall be no broader than as set forth in subdivision (b) of this section,* and the provisions of subdivision (b) of this section shall be strictly construed in accordance with existing law governing labor disputes with the purpose of avoiding any unnecessary judicial interference in labor disputes.

"(b) The acts enumerated in this subdivision, whether performed singly or in concert, shall be legal, and *no court nor any judge nor judges thereof, shall have jurisdiction to issue any restraining order or preliminary or permanent injunction which, in specific or general terms prohibits any person or persons, whether singly or in concert, from doing any of the following:*

(1) Giving publicity to, and obtaining or communicating information regarding the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling any public street or any place where any person or persons may lawfully be, or by any other method not involving fraud, violence or breach of the peace.

(2) Peaceful picketing or patrolling involving any labor dispute, whether engaged in singly or in numbers.

(3) Assembling peacefully to do any of the acts specified in paragraphs (1) and (2) or to promote lawful interests. . . .

"(d) Nothing contained in this section shall be construed to alter the legal rights of public employees or their employers, nor shall this section alter the rights of parties to collective-bargaining agreements under the provisions of Section 1126 of the Labor Code.

"(e) It is not the intent of this section to permit conduct that is unlawful including breach of the peace, disorderly conduct, the unlawful blocking of access or egress to premises where a labor dispute exists, or other similar unlawful activity."

Unfortunately, in effect the majority here rule that passage of the Moscone Act in 1975 had no significant impact on California labor law. That hardly comports with the Act's origins and history. It was patterned after the Norris-LaGuardia Act, whose pertinent aims have briefly been summarized as follows:

". . . Congress was dealing with the problem of the labor injunction. See H. R. Rep. No. 669, 72d Cong. 1st Sess. (1932) Ser. No. 9492; Sen. Rep. No. 163, 72d Cong. 1st Sess. (1932) Ser. No. 9487; (1932) 75 Cong. Rec. 5464, 6467; Frankfurter and Greene, [The Labor Injunction (1930)] at 215: 'But the immunity accorded is circumscribed; it is not immunity from legal as distinguished from equitable remedies,—hitherto unlawful conduct remains unlawful. . . .' 'The measure under discussion merely deals with the most insistent issues presented by the labor injunction as utilized by the federal courts.' *Ibid.* at 226; Frankfurter and Greene, *Congressional Power Over the Labor Injunction* (1931) 31 Col. L. Rev. 385, 408: '. . . the bill only withdraws the remedy of injunction. Civil action for damages and criminal prosecution remain available instruments. Illegal strikes are not made legal.' Norris, *Injunctions in Labor Disputes* (1932) 16 Marq. L. Rev. 151; *cf.* Frankfurter and Greene, . . . at 226, n. 61: '. . . one of the present writers, at the suggestion of the Senate Subcommittee on the Judiciary, collaborated with others . . . in drafting the bill. . . .' Moreover, section 3 of the Norris-LaGuardia Act deals with 'yellow dog' contracts. Here, Congress thought it necessary expressly to refer to 'legal,' as distinguished from 'equitable,' relief. *Cf.* (1932) 75 Cong. Rec. 4767." (Note, *Labor Disputes and the Sherman Act* (1941) 29 Cal. L. Rev. 399, 403, fn. 18(c).)

That, even as amended, the bill that became Code Civ. Proc. § 527.3 was comparably designed is evidenced by its subdivision (d): "Nothing contained in this section shall be construed to alter *the legal rights* of public employees or their employers, nor shall this section alter *the rights* of parties to collective-bargaining agreements under . . . Section 1126 of the Labor Code."

(Italics added.) That first clause excludes equitable rights. The second, contrastingly, protects both equitable rights and legal rights. (Section 1126 of the Labor Code states, "Any collective bargaining agreement . . . shall be enforceable at law or in equity . . . .")

Subdivision (e) of § 527.3 is parallel: "It is not the intent of this section to permit conduct that is unlawful . . . ." By no means do any clauses of the Moscone Act "permit" breaches of the peace, disorderly conduct, the blocking of access or egress to premises where a labor dispute exists, or similar unlawful activity. Why not? Because by obvious implication the draftsmen carefully preserved traditional recourse to criminal prosecution and damages in tort.

These words in the majority opinion (at p. 756 of 160 Cal. Rptr., p. ..... of ..... P. 2d) appear to me to lack perception: "The Union's proposal compels a strained construction of subdivision (b). That subdivision states that the acts there enumerated—essentially peaceful picketing not involving fraud, violence, or breach of the peace—'shall be legal.' The ordinary, common sense meaning of this declaration is that such acts are lawful. From that construction it follows that the obstruction of access, being unlawful both under prior law and subdivision (e), does not fall within the conduct protected by subdivision (b). Under the Union's interpretation, when the Legislature declared an act to be 'legal,' it did not mean that such acts were 'lawful,' but that they are subject to the jurisdiction of courts of common law instead of equity. We think it improbable that the Legislature intended to use the term 'legal' in such a narrow, technical, and unusual fashion."

True, subdivision (b) does declare that certain conduct is "legal". Yet it also confirms that fraud, violence, and breach of the peace are *not legal*. Further, subdivision (e) adds that disorderly conduct, certain blockings of access or egress, and similar activities are *not legal*. Criminal prosecution and actions for damage caused by all those illegal activities are, therefore, appro-

priate. Because of differences in wording between subdivision (b) and subdivision (e), however, only breach of the peace, fraud, and violence may be enjoined.

The words in subdivision (b) that "no court nor any judge nor judges thereof, shall have jurisdiction to issue any restraining order or preliminary or permanent injunction"—as well as related words in subdivision (a) and in the statute's preamble[1] —indicate that the aim that did survive in the Legislature, notwithstanding last-minute amendments to the bill,[2] indeed was to relegate the employer to (1) complaints to the police, and (2) his common law remedies—even when those recourses might, under the equity precedents, technically be regarded as "inadequate".

It is disappointing that the Supreme Court of California, after more than half a century and notwithstanding the recent, plausibly incompatible, California legislative history, now ap-

1. Section 1 of Stats. 1975, c. 1156, p. 2845, provides:

"In the interpretation and application of this act the public policy of this state is declared as follows:

"Equity procedure that permits a complaining party to obtain sweeping injunctive relief that is not preceded by or conditioned upon notice to and hearing of the responding party or parties, or that issues after hearing based upon written affidavits alone and not wholly or in part upon examination, confrontation and cross- examination of witnesses in open court, is peculiarly subject to abuse in labor litigation for each of the following reasons:

"(a) The status quo cannot be maintained, but is necessarily altered by the injunction.

"(b) The determination of issues of veracity and of probability of fact from the affidavits of the opposing parties which are contradictory and, under the circumstances, untrustworthy rather than from oral examination in open court, is subject to grave error.

"(c) The error in issuing the injunctive relief is usually irreparable to the opposing party.

"(d) The delay incident to the normal court of appellate procedure frequently makes ultimate correction of error in law or in fact unavailing in the particular case."

2. For comment on "the final, hectic days of that legislative session" and the likely impact on last-minute amendments see *People* v. *Tanner* (1979) 24 Cal. 3d 514, 542, 156 Cal. Rptr. 450, 467, 596 P. 2d 328, 345.

pends this decision to the judicial history that Messrs. Frankfurter and Greene in 1930 assailed so graphically and devastatingly in their book *The Labor Injunction*. My opinion is that the court thus appears needlessly regressive. (Cf. Christ, Is the Norris Act Constitutional? (1932) 19 Va. L. Rev. 51; Shatz, *Picketing Injunctions in California* . . . (1977) 28 Hast. L. J. 801, 836: "It would be anomalous indeed to conclude that the legislature, after reciting a litany of complaints as to the present injunction practice, enacted a statute which codified the status quo. The broader 'union' interpretation receives some further support from what little legislative history there is." Also cf. *Wilson & Co.* v. *Birl* (3d Cir. 1938) 105 F. 2d 948 and *Alliance Auto Service* v. *Cohen* (1941) 341 Pa. 283, 19 A. 2d 152.)

I concur in the majority's disposition of this proceeding (Part 4 of Justice Tobriner's opinion). I have stated my separate views, though, because I do not believe that the superior court has been correctly instructed regarding its proposed new proceeding.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-735

SEARS, ROEBUCK AND CO.,

Petitioner,

vs.

SAN DIEGO COUNTY DISTRICT COUNCIL OF CARPENTERS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

SECOND SUPPLEMENTAL BRIEF ON BEHALF OF PETITIONER

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SECOND SUPPLEMENTAL BRIEF ON BEHALF OF PETITIONER

This supplemental brief on behalf of Petitioner, Sears, Roebuck and Co. ("Sears") is filed to address this Court's decision in *PruneYard Shopping Center* v. *Robins,* No. 79-289, decided on June 9, 1980.

The instant case presents a factual record dissimilar to that posed in *PruneYard*. Here, unlike *PruneYard,* union picketing of a single freestanding store is involved.[1] Here, unlike *Prune-*

1. The "shopping center" at issue in *PruneYard* was a large and specialized establishment covering "approximately 21 acres—five devoted to parking and 16 occupied by walkways, plazas, sidewalks, and buildings that contain[ed] more than 65 specialty shops, 10 restaurants, and a movie theatre." Sl. Op., at 1. Unlike *PruneYard,*

(Footnote continued on next page.)

Yard where a State proclaimed access privileges generally applicable to all messages, California, by virtue of the Moscone Act, Cal. Code of Civil Procedure, § 527.3, has dictated a specific message. The very "danger of governmental discrimination for or against a particular message" (Sl. Op., at 12), found absent in *PruneYard,* is presented in this case. Here, too, unlike *PruneYard,* Sears has openly disagreed with respondent's message. Finally, unlike *PruneYard,* where the shopping center was permitted to invoke reasonable time, scope, and circumstance limitations, in this case, under the Moscone Act, California has granted open-ended access to labor picketing without any means of control or remedy by the property owner.

The instant case thus raises questions not presented in *PruneYard,* but which warrant resolution. Indeed, the present case provides a desirable vehicle for the Court to resolve in a like, but far more prevalent, circumstance, the legitimacy of union trespassory picketing against a freestanding store. See, *e.g., Central Hardware Co.* v. *N. L. R. B.,* 407 U. S. 539 (1972). Additional issues concerning federal preemption, which were not raised in *PruneYard,* are also presented in this case.

(Footnote continued from preceding page.)

Sears' store is a single store "located in the center of a large rectangular lot", with the building "surrounded by walkways and a large parking area." *Sears, Roebuck and Co.* v. *San Diego County District Council of Carpenters,* 436 U. S. 180, 182 (1978). "Significantly different questions" from those in *PruneYard* are presented where, as here, "a State authorize[s] strangers to picket or leafleteer in privately owned, freestanding stores and commercial premises." Sl. Op., Powell, J., concurring, at 1.

CONCLUSION

For the foregoing reasons, as well as those set forth in Sears' Petition, Response Brief, and Supplemental Brief, this petition for writ of certioriari should be granted.

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The opinions below, the basis of this Court's jurisdiction and the statutory and constitutional provisions involved are set out at pp. 1-3 and A1-A29 of the petition.

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Does this Court's prior decision in this case or the National Labor Relations Act require a state to empower its courts to issue injunctions against an alleged trespass on an employer's property during a labor dispute?

2. Does the Due Process clause of the Fourteenth Amendment require a state to so empower its courts?

STATEMENT OF THE CASE

This case concerns picketing by respondent Union during a labor dispute with petitioner Sears on a private walkway open to the general public at the entrance to a Sears store. The resulting legal controversy grows out of Sears attempt to secure a state court injunction under the state's trespass law. Initially the California Supreme Court reversed such an injunction entered by a California Superior Court on the ground that "state jurisdiction was pre-empted under the [*San Diego Unions* v.] *Garmon* [359 U.S. 236] guide lines." (*Sears, Roebuck & Co.* v. *Carpenters*) 436 U.S. 180, 184 (*Sears I*).)

Sears then brought the matter to this Court arguing that "the protection of private property from trespass is an interest deeply rooted in local feeling and responsibility" (Brief for Sears, Roebuck and Co. in No. 76-750, Oct. Term, 1976, p. 8; heading, first letter capitals omitted) and therefore within the exception to the basic *Garmon* rule stated in 359 U.S. at 244. The respondent Union replied, *inter alia*, it appeared that under the California Code of Civil Procedure, § 527.3 (the Moscone Act), the "California courts may not enjoin [labor] picketing as long as it is peaceful and not disruptive" (Brief for Respondent in No. 76-750, Oct. Term, 1976, p. 16), that the California Supreme Court had not passed on that or related state law questions (*id.* at 8-18), and that a "remand * * * for a determination as to whether the injunction issued here is proper under state law" would be in order (*id.* at 37). In its reply brief in *Sears I.*, petitioner disputed the Union's reading at § 527.3 but did not even suggest that Federal law requires the states to issue such injunctions. To have done so would. of course, have compromised its reliance

on the "deeply rooted in local feeling and responsibility" exception to *Garmon*. In its *Sears I* decision this Court, noting that the Union's state law arguments were not affected (436 U.S. at 185, n. 8), concluded that at least where a union does not seek through a charge filed with the National Labor Relations Board to establish that its picketing is protected by the National Labor Relations Act; *Garmon* does not oust the state courts of jurisdiction to enforce state trespass law (*id.* at 199-208), and "remanded * * * for further proceedings not inconsistant with [the] opinion," (*id.* at 208).

On remand, the California Supreme Court held that under the Moscone Act, whose "purpose [is] the elimination of unnecessary judicial intervention into labor disputes" (Pet. App. A15-A16), "[p]eaceful picketing outside the store, involving neither fraud, violence, breach of the peace, nor interference with access or egress, is not subject to the injunction jurisdiction of the [California] courts" (*id.* at A16-A17). That court's judgment accordingly reversed the injunction order against the Union. (See Pet. App. A25.)

Petitioner now returns to this Court to urge that *Sears I* and the NLRA *require* the state to issue that injunction.

ARGUMENT

I *Petitioner's NLRA Preemption Claim Is Insubstantial.*

In urging that the decision below is violative of the National Labor Relations Act (NLRA) petitioner does not invoke the exclusive primary jurisdiction of the National Labor Relations Board under cases such as *San Diego Unions* v. *Garmon*, 359 U.S. 236. For it is not petitioner's position that the state courts of California were without juris-

diction over this litigation. On the contrary, petitioner *invoked* that jurisdiction by seeking and obtaining a preliminary injunction against the Union's picketing. And in *Sears Roebuck & Co.* v. *Carpenters*, 436 U.S. 180 *(Sears I)* petitioner successfully urged this Court to hold, contrary to the decision of the California Supreme Court, that the NLRA does *not* oust the state courts of jurisdiction.

Thus, petitioner's claim under the NLRA, such as it is, invokes the principle "that there is 'conduct which a State may not prohibit even though it is not covered by § 7 of the [Labor] Act. *Sears*, 436 U.S. at 199, n. 30 * * *'" (Pet. 3). But that "line of analysis" *(id)*, never raised below [1], is, on its face, not applicable here since the California Supreme Court did *not* "prohibit" any conduct by petitioner Sears. Of the perhaps dozens of cases in this Court which have dealt with various facets of the relationship between the NLRA and state law, there is not one which has held that a

[1] Petitioner did not present this argument to the California Supreme Court. Rather, the "preemption" contention below was premised on the notion that under *Labor Board* v. *Babcock & Wilcox Co.*, 351 U.S. 105, Sears' use of its no-solicitation rule was "federally *protected*" (Respondent's Supplemental Brief, California Supreme Court No. LA 30562 ("Resp. Supp. Br.") at 14-15 (emphasis supplied)). Based on this erroneous premise, Sears asserted (*id.* at 15) that:

> "In these circumstances, due regard for the federal enactment requires that state jurisdiction must yield *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 244 (1959). The animating force behind the doctrine of labor law preemption has been the recognition that nothing could more fully serve to defeat the purposes of the [Labor] Act than to permit state and federal courts, without any limitation, to exercise jurisdiction over activities that are subject to regulation by the National Labor Relations Board (*Sears* v. *San Diego Carpenters*, 98 S.Ct. at 1768 (Brennan, J., dissenting)).

Thus, the argument below relied upon the very *Garmon* issue

state court is required to issue an injunction in a labor dispute or to award damages for tortious conduct in such a dispute. The reason is obvious: the duties created by the NLRA are enforcible only by the NLRB. Thus, while the state courts are, of course, forbidden by the Supremacy Clause from interfering with the exercise of any rights granted by the NLRA (as *Machinists* v. *Wisconsin Emp. Rel. Comm'n* 427 U.S. 132, for example, holds), the NLRA is not one of those statutes (such as, for example, the Federal Employers Liability Act) [2] in which Congress has mandated the State courts to provide a remedy for the violation of Federal rights.[3]

It is, of course, true "that in certain situations notwithstanding that the conduct involved is neither protected nor prohibited by the Labor Act, 'the exercise of state authority' would, nevertheless, 'frustrate effective implementation of the policies' of that Act." (Pet. 5 quoting *New York Tel. Co.* v. *New York Labor Dept.*, 440 U.S. 519, 531 (opinion of Stevens J.). See also *Machinists, supra; Teamsters Union* v. *Morton*, 377 U.S. 252.) But that principle adds

which petitioner now recognizes (Pet. 4-5) was foreclosed—in accord with petitioner's position at the time—by this Court's earlier decision in this case.

[2] *See Second Employers Liability Act Cases*, 223 U.S. 1; cf. *Testa* v. *Katt*, 330 U.S. 386 (§ 205 of the Emergency Price Control Act, 56 Stat. 32).

[3] While the state courts have jurisdiction, concurrent with the federal courts, to vindicate rights under § 301(a) of the Labor-Management Relations Act of 1947 (*Dowd Box Co.* v. *Courtney*, 368 U.S. 502; *Humphrey* v. *Moore*, 375 U.S. 335) it has not been decided whether the state courts *must* exercise that jurisdiction. Since petitioner, despite its inapposite reference to "bargaining relationships" (Pet. 7), has not invoked § 301(a) there is no occasion to consider that question here.

nothing of substance to the petition. The claim here does not concern "the exercise of state authority"; the objection is that the state has, as a matter of state law, *refused* to exercise its authority to authorize its courts to issue certain injunctions. The assertions that "California here has directly sought to impose its own substantive regulation of labor-management relations" (Pet. 6), and that therefore this case presents the "question of whether this deliberate state regulation of bargaining relationships is a permissible intrusion upon the national labor policy" (Pet. 7), simply mistake the operative effect of the judgment below which is only to *withhold* state regulation on behalf of either party.

To be sure, petitioner urges that the California Supreme Court's opinion construes the Moscone Act as declaring that "the picketing was 'lawful' and the employer has no * * * right * * * of self-help." (Pet 6.) But as was observed in dismissing as improvidently granted the writ of certiorari to that Court in *Black* v. *Cutter Laboratories,* 351 U.S. 292, 297: "This Court, however, reviews judgments, not statements in opinions. *Herb* v. *Pitcairn,* 324 U.S. 117, 125-126, *Morrison* v. *Watson,* 154 U.S. 111, 115. See also *Williams* v. *Norris,* 12 Wheat. 117, 118, 120."

Moreover, while petitioner asserts that the NLRA grants employers a "right" of self help to expel union pickets, it is unable to point to any provision of that Act stating that right. Sears merely argues that the decision below "calls into question the validity under state law of federally permissible no-solicitation rules against non-employee activity on private property." (Pet. 9, citing *Labor Board* v. *Babcock & Wilcox,* 351 U.S. 105, 112-113.) But that case and its progeny hold that such rules are "permissible" only in the sense that they are not forbidden by the NLRA. The

"burden imposed on a union to justify access on private property" (Pet. 8) is simply a condition for a union to obtain protection under the NLRA, as is made clear in *Sears I,* 436 U.S. at 205, to which petitioner refers. Indeed, this Court, in rejecting the proposition that because the picketing herein was arguably an unfair labor practice the NLRB's jurisdiction is exclusively, stressed that the NLRA does not declare trespass as such to be an unfair labor practice.[4]

II. *Petitioner's Constitutional Claims Are Insubstantial*

Petitioner asserts that the constitutional issue raised here is the same as that in *Prune Yard Shopping Center* v. *Robins,* No. 79-289, which this Court has set for plenary consideration, and that a grant of certiorari in this case would be "desirable." (Pet. 8.) But Sears does not explain how consideration of the present case would further the Court's deliberations concerning that constitutional issue, and why this Court should not, as it more usually does with related cases, hold the present petition for disposition in

[4] The *Sears I* Court stated:

> In the present case, the controversy which Sears might have presented to the Labor Board is not the same as the controversy presented to the state court. If Sears had filed a charge, the federal issue would have been whether the picketing had a recognitional or work-reassignment objective; decision of that issue would have entailed relatively complex factual and legal determinations completely unrelated to the simple question whether a trespass had occurred. Conversely, in the state action, Sears only challenged the location of the picketing; whether the picketing had an objective proscribed by federal law was irrelevant to the state claim. Accordingly, permitting the state court to adjudicate Sears' trespass claim would create no realistic risk of interference with the Labor Board's primary jurisdiction to enforce the statutory prohibition against unfair labor practices. [436 U.S. at 198; footnote omitted.]

light of the outcome in *Prune Yard*. Nevertheless, if the issues were indeed "necessarily identical" (Pet. 8) we would not press our opposition to the grant of certiorari with respect to the constitutional issue here (although that "identity" could not possibly justify a grant on the pre-emption issue, which is wholly insubstantial.) But this case is unlike *Prune Yard*, and petitioner's case is weaker, in two significant respects.

First, the judgment below rests on two independent state policies, of which only one, that based on the California State Constitution, underlies the judgment in *Prune Yard*. The other is the policy of § 527.3: "the elimination of unnecessary judicial intervention into labor disputes" (Pet. App. 15A-16A). The proposition that the Due Process Clause of the Fourteenth Amendment forbids the states from implementing such a policy is, we submit, of insufficient merit and importance to warrant this Court's attention.

The other distinction between this case and *Prune Yard* is even more critical, and is due to the different nature of the two proceedings and of the resulting judgments of the California Supreme Court. *Prune Yard* is an action brought by the persons who wish to communicate on the property of another seeking an order declaring that they are entitled to do so and may not be removed; the judgment under review in *Prune Yard* grants that relief. The present action, however, is one by the owner of property for an *injunction* against communication on its property, and the judgment below merely denies petitioner that relief.

It is for this reason that question 4 (Pet. 2) which has no equivalent in Prune Yard is indispensable to Sears' petition. And since "this Court reviews judgments and not statements in opinions" (*Black* v. *Cutter Laboratories*, *supra*), that question is more accurately phrased "whether the Due Process Clause of the Fourteenth Amendment requires the state to empower its courts to issue *an injunction* against the union?" Petitioner's citation of *Truax* v. *Corrigan*, 257 U.S. 312 as authority for the existence of such a constitutional right (Pet. 10) carries its own death wound. As Mr. Justice Frankfurter wrote for the Court in *Teamsters Union* v. *Vogt, Inc.*, 354 U.S. 284, 287-288:

> The series of cases concerning the use of the injunction in labor controversies begins with *Truax* v. *Corrigan*, 257 U.S. 312, in which a closely divided Court found it to be violative of the Equal Protection Clause —not of the Due Process Clause—for a State to deny use of the injunction in the special class of cases arising out of labor conflicts. The considerations that underlay that case soon had to yield, through legislation and later through litigation, to the persuasiveness of undermining facts. Thus, to remedy the abusive use of the injunction in the federal courts, see Frankfurter and Greene, The Labor Injunction, the Norris-LaGuardia Act, 47 Stat. 70, 29 U.S.C. § 101, withdrew, subject to qualifications, jurisdiction from the federal courts to issue injunctions in labor disputes to prohibit certain acts. Its example was widely followed by state enactments.

We need add only two brief observations:

a) Petitioner did not assert either in the court below, or in its petition for certiorari, that it has been denied the equal protection of the laws under the Fourteenth Amend-

ment.[5] Thus, *Truax* would not support Sears' claim that it is constitutionally entitled to an injunction even if it were still good law.

b) But of course, as the *Vogt* opinion shows, *Truax* is not good law. *Senn* v. *Tile Layers*, 301 U.S. 468 not only limited *Truax* to its particular facts but signalled that "the current [of constitutional decision was] running strongly in the new direction—the direction not of social dogma but of increased deference to the legislative judgment."[6] Sears' attempt to reverse the tide does not merit this Court's consideration. For Sears cannot possibly surmount "the difficulty of requiring a state court to issue an injunction that it never has been empowered to issue by the quasi sovereign that created the court." (*Truax* 257 U.S. at 344 (Holmes, J. dissenting).)

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[5] The sentence from *Truax*, 257 U.S. at 330, which is partially quoted at Pet. 10 dealt with the case on the assumption that the state had deprived the employer of all remedies. As noted in *Vogt*, 354 U.S. at the question of the denial of "only the equitable relief of injunction"—which alone is present on this record—was treated in *Truax* as analytically distinct, and as raising only an "equal protection" issue. (See 257 U.S. at 330 *et seq.*)

[6] This is Mr. Justice Frankfurter's characterization of *Senn* in his concurring opinion in *A. F. of L.* v. *American Sash Co.*, 335 U.S. 538, 544. In that opinion Justice Frankfurter said also (*id.* at 543-544):

> The attitude which regarded any legislative encroachment upon the existing economic order as infected with unconstitutionality led to disrespect for legislative attempts to strengthen the wage-earner's bargaining power. With that attitude as a premise, *Adair* v. *United States*, 208 U.S. 161, and *Coppage* v. *Kansas*, 236 U.S. 1, followed logically enough; not even *Truax* v. *Corrigan*, 257 U.S. at 312, could be considered unexpected.

CONCLUSION

For the above stated reason the petition for a writ of certiorari should be denied.

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1. It is undisputed that what is involved in this case is not the first branch of the preemption line of analysis considered in *Sears, Roebuck and Co.* v. *San Diego County District Council of Carpenters,* 436 U. S. 180 (1978) ("Sears I"), but the second branch of the "line of preemption analysis" recognized in, although "unaffected" by, *Sears I,* 436 U. S. at 199, n. 30.[1]

1. While Respondent suggests that Sears never raised this preemption line of analysis below (Br. Opp. p. 4, n. 1), Sears argued both in its briefs, and at oral argument, that "(i)t [was] . . . this very potential of state interference with the federal labor law scheme which the preemption doctrine was designed to prevent" (Respondent's Supplemental Brief, California Supreme Court No. LA 30562 at 15) and, in fact, repeatedly referenced (*id.* at 6 and 15) this Court's own recognition of the two-pronged "protected" preemption line of analysis underscored in *Sears I.*

This second branch "focus(es) upon the crucial inquiry whether Congress intended that the conduct involved be unregulated because left 'to be controlled by the free play of economic forces.' *N. L. R. B.* v. *Nash-Finch Co.*, 404 U. S. 138, 144 (1971)." *Ibid.* In this case, the State's refusal to treat Sears as any other property owner confronted by a trespass, solely because that trespass arose as part of a "labor dispute," constitutes such an impermissible regulation of bargaining relationships. A State's determination to withhold court access otherwise available—no less than its decision to grant a special preference in a labor dispute that would not otherwise be permitted—"upsets the balance of power between labor and management expressed in our national labor policy." *Teamsters Union* v. *Morton*, 377 U. S. 252, 260 (1964).

Respondent cannot now avoid this preemption line of analysis by arguing that the "exercise of state authority" is not at issue because "the operative effect of the judgment below . . . is only to *withhold* state regulation on behalf of either party." Br. Opp. p. 6 (emphasis the author's). Despite Respondent's semantic juggling act, the effect of the decision below is the same: the State has imposed its own substantive judgment to alter the balance between labor and management. While state trespass laws are neutral on their face, the Moscone Act, as interpreted by the California courts, is not. It permits union access on private property[2] in a labor context where such access would not otherwise be tolerated. Sears is not asking, as Respondent repeatedly suggests (Br. Opp., pp. 1, 2, 3), that the State be "required" to issue injunctive relief; it is only seeking to have its claim for such relief adjudicated without reference to the State's concept of labor-management relations.

2. Lest Respondent relitigate facts found against it by the trial court, there is no question in this case, as this Court found in *Sears I*, that the union's "pickets patrolled . . . on the privately owned walkways next to (Sears') . . . building or in the (private) parking area a few feet away." *Sears I*, 436 U. S. at 182.

Indeed, California in this case has even rejected the approach of *N. L. R. B.* v. *Babcock & Wilcox*, 351 U. S. 105, 112 (1956), which sought to accommodate federal constitutional property rights with union access rights under the Labor Act. "[T]he principle of accommodation" announced in *Babcock & Wilcox* limits "intrusion on property rights . . . to that necessary to facilitate the exercise of employees' § 7 rights." *Central Hardware Co.* v. *N. L. R. B.*, 407 U. S. 539, 545 (1972). Here, however, the Union's picketing was admittedly not protected by § 7 of the Labor Act. App. A to Pet., p. A3, n. 1. It is not open to California to refuse to apply *Babcock & Wilcox* (App. A to Pet., p. A12) and thereby alter the federally mandated relationship between labor and management.

2. State court jurisdiction cannot be foreclosed for another reason. The "anomalous consequence of a rule which would deny the employer access to any forum in which to litigate either the trespass issue or the protection issue" (*Sears I*, 436 U. S. at 206-07) still remains. This is particularly so inasmuch as the State has also precluded Sears from utilizing self-help to eject the pickets. App. A to Pet., pp. A14-A15, n. 11. This denial of any relief cannot be characterized as mere dicta or irrelevant statement (Br. Opp., p. 6); it is instead an indispensable part of the Moscone Act (see Pet., p. 6) upon which the court below solely predicated its judgment. App. A to Pet., pp. A9-A10, n. 5. In these circumstances, California's denial of any relief against unprotected union activity "raises grave problems for its legitimacy." *Boddie* v. *Connecticut*, 401 U. S. 371, 376 (1971). For example, a State may not prohibit all picketing, other than labor picketing, at public schools. *Police Department* v. *Mosley*, 408 U. S. 92 (1972). See also *Brown* v. *Scott*, 602 F. 2d 791 (7th Cir., 1979), *cert. granted sub nom., Carey* v. *Brown*, No. 79-703 (Jan. 7, 1980); and *People Acting Through Community Effort* v. *Doorley*, 468 F. 2d 1143 (1st Cir., 1972). In such a case, however, the labor dispute exception is not sanctioned by federal preemption of labor relations because of

the exemption of cities and school boards from regulation under the Labor Act. *Id.* at 102, n. 9. Where, as in this case, no such exemption exists, the doctrine of labor preemption precludes a State from granting a special status to designated labor practices.

3. In *PruneYard Shopping Center* v. *Robins,* No. 79-289, this Court has now agreed to decide the issue raised here by Sears concerning the "exercise (of) general rights of free speech on property privately owned and used nondiscriminatorily for private purposes only." *Lloyd Corp.* v. *Tanner,* 407 U. S. 551, 568 (1972). While this case also presents other issues, this fact does not vitiate the desirability of this Court's concurrent review of both decisions of the California Supreme Court.

CONCLUSION.

For all of the foregoing reasons, this petition for writ of certiorari should be granted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-735

SEARS ROEBUCK AND CO., *Petitioner,*

v.

SAN DIEGO COUNTY DISTRICT COUNCIL OF CARPENTERS, *Respondent.*

BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

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INTEREST OF THE AMICUS CURIAE *

The Chamber of Commerce of the United States of America [hereinafter the Chamber] is the largest association of business and professional organizations in the United States and, as such, is the principal spokesman for the American business community.

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* This brief is filed with the written consent of all parties pursuant to Supreme Court Rule 42.

The Chamber has a direct membership of over 86,000 corporations, partnerships, proprietorships, and professionals, as well as over 3,700 state and local chambers of commerce and professional and trade associations.

The Chamber regularly represents its members' interests in litigation matters before the courts, the United States Congress, the Executive Branch and Federal regulatory agencies. Such representation constitutes a significant aspect of the Chamber's activities and includes participation as an *amicus curiae* in numerous cases before this Court.[1]

The underlying issue presented in this case, whether, within the bounds of the U.S. Constitution, a state statute can preclude an employer from receiving common law relief for trespass on his private property by a union engaged in admittedly unprotected activity, is of major concern to the Chamber and its members.

The answer to this question will necessarily have a significant impact on the rights of many Chamber members and their manner of doing business. A company's interest in precluding unauthorized intrusion on its private property is based on more than mere naked title. Allowing access to distribution of union materials or solicitation by union organizers can weaken an employer's right to enforce an otherwise

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[1] *E.G., Scott Hudgens* v. *N.L.R.B.*, 427 U.S. 507 (1976); *New York Telephone Co.* v. *New York State Dept. of Labor*, —— U.S. ——, 59 L.Ed. 553 (1979); *Connell Construction Co., Inc.* v. *Plumbers & Steamfitters Local 100*, 421 U.S. 616 (1975); *N.L.R.B.* v. *Sears Roebuck & Co.*, 421 U.S. 132 (1975); *Industrial Union Department, AFL-CIO* v. *American Petroleum Institute, et al.*, No. 78-911 (pending).

legitimate no-solicitation policy against other forms of solicitation or distribution, as well as appearing to the general public that that particular activity is condoned. Moreover, permitting the distribution or solicitation activity presents the very real danger that individuals desirous of engaging in legitimate business activities will be discouraged from entering. Finally, the activity objected to herein creates potential safety and liability problems for employers. It is for this reason that the Chamber respectfully submits its views.

REASONS FOR GRANTING THE WRIT

I. The Moscone Act Impermissably Regulates Labor-Management Relations And Is Therefore Preempted By National Labor Policy

In its prior opinion in this case, this Court referred to three options open to any employer faced with picketing that is neither directly prohibited nor protected by the National Labor Relations Act, 29 U.S.C. § 151, *et seq.*:

1) Permit the pickets to remain on its private property;

2) Forcefully evict the pickets; or

3) Seek the protection of the state's trespass law.

Sears Roebuck and Co. v. *San Diego County District Council of Carpenters*, 436 U.S. 180, 202 (1978).

In its decision on remand, the Supreme Court of California, relying on a statute passed during the pendency of this case, eliminated the last two options, leaving Sears with only the "option" of permitting the pickets to remain on its property. *Sears, Roebuck &*

Co. v. *Carpenters,* (A-1, 11, 14-15, n. 11). In this regard, the Court held that "peaceful picketing on privately owned sidewalks outside the employer's store is not subject to injunction," and that "judicial intervention in such a case is 'unnecessary' to protect substantial rights of the employer." Thus Sears is once again thrown into the trespassory picketing "no-man's land" referred to in Justice Blackmun's concurring opinion. *Sears, supra* at 208.

Congress, in enacting the N.L.R.A., clearly did not intend employers to be placed in the position where they had resort to neither the National Labor Relations Board nor to common-law prohibitions on trespass. Rather, resort to common-law trespass law is exactly the sort of "self-help" that Congress intended to be part and parcel of the collective bargaining process. *Cf. Lodge 76* v. *Wisconsin Employment Relations Comm'n.,* 427 U.S. 132, 139 (1976), *New York Telephone Co.* v. *New York State Department of Labor,* —— U.S. ——, 59 L.Ed. 2d 533 (1979). By abrogating Sears' right to resort to common-law prohibitions on trespass, California has impermissably interfered with the national labor scheme.

In *New York Telephone* v. *New York,* this Court reviewed its prior decisions on federal preemption of state statutes, and outlined when that doctrine would be applied. The Court distinguished *New York Telephone* from *Lodge 76* v. *Wisconsin Employment Relations Comm'n, supra,*[2] noting that the New York stat-

[2] In distinguishing *New York Telephone* and *Lodge 76,* this Court noted that the general purpose of the New York program was not to regulate the bargaining relationships between employers and employees, but rather "to provide an efficient means of insuring employment security in the state." [footnote omitted]

ute (which the Court found not preempted) "did not involve any attempt by the state to regulate or prohibit private conduct in the labor-management relations field." *New York Telephone,* 59 L.Ed 2d at 564. In this regard, this Court stated that its cases "have consistently recognized that a congressional intent to deprive the states of their power to enforce such general laws is more difficult to infer than an intent to preempt laws directed specifically at concerted activity." *New York Telephone, supra,* at 565. *See also Sears, supra,* 436 U.S. at 193. This Court in *Lodge 76* and *New York Telephone* also recognized that even though activity is neither protected nor prohibited by the N.L.R.A., a state statute can be preempted where it frustrates effective implementation of the Act's policies. *Sears, supra,* 436 U.S. at 199, *New York Telephone, supra,* at 563.

There can be no doubt that the Moscone Act upon which the California Supreme Court based its decision is a statute aimed expressly at concerted activity. In the first place, section b(2) of the statute legalizes, "Peaceful picketing or patrolling involving any labor dispute, whether engaged in singly or in numbers." As the Supreme Court of California stated: "The Moscone Act (Code Div. Proc., § 527.3) . . . establishes the le-

New York Telephone, supra at 564. In addition, the Court observed that the unemployment compensation program in *New York Telephone* received federal subsidies and therefore was structured to comply with a federal statute. "[A]s the Court has pointed out in the past, the federal statute authorizing the subsidy provides additional evidence of Congress' reluctance to limit the state's authority in this area." *New York Telephone* at 566. Since neither of these factors is present in the instant case, *Lodge 76* is controlling here and not *New York Telephone.*

gality of certain *labor practices* and limits the equity jurisdiction of the superior court to enjoin such practices. It is difficult to conceive of a statute which is directed more "specifically at concerted activity." *See supra* p. 5, *See* Cox, Labor Law Preemption Revisited, 85 *Harv.L.Rev.* 1337, 1355-56.

That Congress was aware at the time of enactment of the National Labor Relations Act that employers would have access to state courts to enforce common-law prohibitions on trespass appears obvious. In this regard, Professor Cox has stated in his well-accepted article on labor preemption:

> "It is equally plain that Congress developed this special framework for self-organization and collective bargaining within a larger context of state law creating *rights of property,* bodily security and personality, preserving public order, and promoting public health and welfare (emphasis added). Cox, *supra,* at 1355.

Inasmuch as Congress was aware of this state remedy at the time of passage of the statute and has made no attempt subsequently to preclude its use leads to a strong inference that Congress intended that employers have access to it. Cf., *New York Telephone, supra* at 572.

Finally, it appears indeed incongruous that the union here is in a better position than if it invoked the Board's jurisdiction. For if it did so, it would have to rationalize its conduct pursuant to the criteria of *N.L.R.B.* v. *Babcock and Wilcox,* 351 U.S. 105 (1956). And, as this Court previously noted in this case, the right of an employer to *bar* non-employee union organizers from his property "remains the general rule." *Sears* v. *Carpenters, supra* at 205.

Whether California could intrude in this manner on labor-management relations deserves resolution by this Court.

II. California's Taking of Private Property for Union Activities Violates the Fifth and Fourteenth Amendments.

The Moscone Act as interpreted by the California Supreme Court appropriated Sears' private property for union picketing by non-employees. In *Lloyd Corp.* v. *Tanner,* 407 U.S. 551 (1972); *Central Hardware Co.* v. *N.L.R.B.,* 407 U.S.. 539 (1972); and *Scott Hudgens* v. *N.L.R.B.,* 424 U.S. 507, 520-521 (1976), this Court held that the First Amendment does not protect either nonlabor or labor picketing on private property and, in particular, on shopping center property. In *Central Hardware* and again in *Hudgens,* this Court reaffirmed its holding in *Babcock and Wilcox, supra,* at 112, that conflicts between labor's statutory right to picket and employers' constitutional property rights must both be accommodated in such a manner that there is as "little destruction of one as is consistent with the maintenance of the other." *Hudgens, supra,* at 521.

Despite the clear and repeated mandate of this Court, the California Supreme Court believed it was immune from this principle because "the *Babcock and Wilcox* doctrine . . . rest[s] upon a statutory and administrative basis not found in California law." (A-13).

In so holding, the California Court ignores the fact that the employer's right under *Babcock* and *Wilcox* are founded in the Fifth and Fourteenth Amendments'

protection of private property rights. Or as dissenting Judge Richardson stated:

> " . . . the federal principle discussed in *Babcock, Central Hardware* and *Hudgens* clearly is solidly founded upon the *private property rights* of the store owner, which rights derive not from any capricious or evanescent state statute, but rather upon the rock-solid footing of the Fifth and Fourteenth Amendments of the United States Constitution." (emphasis in original) (A-23).

The Chamber strongly believes that the California Supreme Court's blyth abrogation of the constitutional property rights justifies the granting of the writ requested in this case. For, if states can so easily erase an employer's ability to protect his constitutional rights, those rights have effectively ceased to exist.

CONCLUSION

For all the foregoing reasons, the petition for writ of certiorari filed by Sears, Roebuck & Company should be granted.

Respectfully submitted,

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